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**THE ROLE OF ENVIRONMENTAL
PRINCIPLES IN THE DECISIONS OF THE
EUROPEAN UNION COURTS AND NEW
SOUTH WALES LAND AND
ENVIRONMENT COURT**

Thesis submitted for the degree of Doctor of Philosophy in Law,
Trinity Term 2010

ABSTRACT

The thesis is a comparative legal analysis of environmental principles in environmental law. Environmental principles are novel concepts in environmental law and they have a high profile in environmental law scholarship. This high profile is promoted by two factors – the high hopes that environmental law scholars have for environmental principles, and the increasing prevalence of environmental principles in legal systems, particularly in case law. This thesis analyses the latter, mapping doctrinal developments involving environmental principles in two jurisdictions and court systems – the courts of the European Union and the New South Wales Land and Environment Court.

This doctrinal mapping has both narrow and broad aims. Narrowly, it identifies the legal roles *in fact* taken on by environmental principles within legal systems. Broadly, and building on this assessment, it responds to scholarly hopes that environmental principles (can) perform a range of significant roles in environmental law, including solving both environmental problems and legal problems in environmental law scholarship. These hopes are based on assumptions about environmental principles that have methodological weaknesses, including that environmental principles are universal and that they fit pre-existing models of ‘legal principles’ drawn from other areas of legal scholarship. The thesis exposes these methodological problems and concludes that environmental principles are not panaceas for pressing and perceived problems in environmental law. It does this by showing that the legal roles of environmental principles, which *are* significant in environmental law and its current evolution, can only be understood by closely analysing the legal cultures in which they feature. This is a conclusion for environmental law scholarship generally – while environmental issues and

problems may be urgent and often global, legal analysis of the law that applies to those problems requires close engagement with legal systems and cultures, as they are and as they develop.

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CHAPTER 1

COMPARATIVE DOCTRINAL ANALYSIS OF ENVIRONMENTAL PRINCIPLES IN JUDICIAL REASONING: A METHODOLOGICAL FRAMEWORK FOR ENVIRONMENTAL PRINCIPLES IN LAW

...we are condemned to toil in the dimmest light as we feel our way toward the evolution of our conceptions and ideals of the natural order.¹

A INTRODUCTION

Environmental principles have a high profile in environmental law internationally, and they carry high hopes for environmental law scholars.² These hopes relate not simply to the legal roles and impact of environmental principles themselves, but also to the coherent structure and legitimacy of environmental law as a discipline. The project of this thesis is a legal analysis of environmental principles that addresses both these points: narrowly, it maps the legal roles that environmental principles are playing in different legal systems; and it also examines the significance of this analysis of environmental law more broadly, in light of the scholarly ambitions for environmental principles in environmental law. Thus environmental scholars hope, often concurrently, that environmental principles will provide solutions to *environmental problems* and that they will provide solutions to *legal problems* in environmental law. In the latter sense, environmental principles might be universal and foundational legal concepts that bring

¹ L Tribe, 'Ways Not To Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83(7) Yale LJ 1315, 1341.

² As they do for policy-makers in representing solutions to environmental problems: see Chapter 2(B)(2).

coherence to the disorganised, multi-jurisdictional bundle of regulation and decisions that constitute environmental law; they might make environmental law look like other established legal subjects (including through the role of principles in judicial reasoning); or they might otherwise overcome the considerable challenges of methodology in environmental law scholarship.³ This final point is significant because environmental law is a discipline beset by methodological challenges – particularly due to its multi-jurisdictional, interdisciplinary, novel and reactive nature. And it has no long-standing legal tradition in which to frame and analyse its legal developments.

However, far from being a solution to such methodological challenges, environmental principles are affected by them in the same way as are other legal developments in environmental law. In particular, there is no way to define legally what an environmental principle is in the abstract. This is not simply because there is no universal doctrinal tradition of ‘environmental principles’ in environmental law, but because such a theoretical tradition is not possible, considering the ambiguous and open-ended nature of environmental principles and the multiple jurisdictions in which, increasingly, they have legal roles. Further, environmental principles are inconsistently labelled, defined and grouped, and adopted and applied in a wide range of legal as well as non-legal contexts. And environmental principles are, first and foremost, statements of policy. Environmental principles represent goals of environmental protection and sustainable development: they include, for example, the polluter pays principle, the precautionary principle and principle of sustainable development. All of this represents a significant challenge for their legal study. Indeed it raises the question whether they are appropriate subjects of legal study at all.

³ These high hopes for environmental principles and the reasons for their proliferation in environmental law scholarship are examined in Chapter 2(B).

This thesis responds to these challenges by arguing that environmental principles are appropriate subjects of legal study, within a suitably framed methodology, in light of increasing legal developments in some jurisdictions, particularly in the last 15 years. Thus it examines judicial reasoning involving environmental principles in two jurisdictions: the European Union ('EU') and New South Wales ('NSW'). This exercise involves mapping the doctrinal treatment of environmental principles in two distinct bodies of judicial reasoning of courts in these jurisdictions: the European Court of Justice ('ECJ') and General Court (formerly the Court of First Instance ('CFI')) in the EU, and the New South Wales Land and Environment Court ('LEC') in NSW. Such mapping analyses the evolving roles of environmental principles comparatively – testing scholarly assumptions that environmental principles are universal – and in a manner that focuses in detail on the legal frameworks in which environmental principles are employed.

These close, contextual analyses of environmental principles in EU and NSW law map these two terrains of environmental law to show that environmental principles do very different things legally in these different legal settings. The resulting maps identify the various legal roles that environmental principles are playing in each jurisdiction, and the differences between them reinforce that there are no scholarly shortcuts in appraising the evolution of environmental law, particularly not in the form of environmental principles. Thus, environmental principles do not unify environmental law universally, legitimise it as a scholarly subject, or solve its methodological problems, or otherwise provide solutions to environmental problems. Rather, environmental principles are significant focal points for determining the nuanced evolution of environmental law within discrete legal systems, in terms of their own legal frameworks, doctrines and cultures. This approach, and conclusion, is one for environmental law scholarship generally – the only way to understand novel legal concepts in environmental law is to

understand the complexities of the legal systems in which they operate. Thus a comparative doctrinal analysis of case law concerning environmental principles is significant both in elaborating the legal roles of principles within particular legal systems and in examining their broader role within environmental law scholarship.

This Chapter introduces the project of this thesis in two stages. First, it sets out the analytical frame of reference and methodology adopted to examine environmental principles in EU and LEC case law – comparative doctrinal analysis to produce maps of how environmental principles are treated in judicial reasoning in these two different legal cultures. Second, this Chapter explores further why a comparative study of judicial reasoning concerning environmental principles is a useful exercise in environmental law. In simple terms, the reason for a doctrinal appraisal of *judicial reasoning* concerning environmental principles is that rich and largely unexplored legal resources are provided by the two particular bodies of case law examined. The legal roles taken on by environmental principles in judicial reasoning are exposed by doctrinal analysis, providing a framework for further legal analysis of environmental principles, as well as creating a developing map of environmental law in each jurisdiction. The importance of studying environmental principles in judicial reasoning *comparatively* is highlighted by considering comparative law scholarship, which – in terms of ‘legal culture’ – develops the methodological point that legal concepts must be understood within their contexts of operation.

Chapters 2 and 3 build the broader argument for the importance of this comparative analysis in terms of environmental law scholarship, along the lines suggested above. Thus, Chapter 2 examines the scholarly motivations for, and methodological limitations involved in, analysing environmental principles in environmental law scholarship to date; and Chapter 3 examines the evolution of environmental principles

within the particular legal contexts mapped in this thesis. This deeper examination of environmental principles within legal contexts, and their role in environmental law scholarship, shows that environmental principles are not universal legal concepts for which there is an obvious legal analytical framework, although environmental law scholarship often assumes this is the case. Rather, environmental principles look very different, despite similar names, in different jurisdictions. The comparative element of the case law analysis in this thesis is thus critical to understanding the legal roles of environmental principles, and also to test the wide-ranging (often implicit) claims for environmental principles in environmental law scholarship, and thereby to examine the current state of *methodology* in environmental law scholarship.

Before setting out this methodological approach in more detail, the following Section sets out the environmental principles with which this thesis is concerned and the extent of their high profile in environmental law. The deep scholarly interest in environmental principles is elaborated critically in Chapter 2, but the sketch here of the wide legal interest in environmental principles makes a strong case that environmental principles are increasingly prominent legal phenomena, of which environmental lawyers need to make sense and which they should take seriously in appreciating how environmental law is evolving across jurisdictions.

B ENVIRONMENTAL PRINCIPLES AND THEIR HIGH PROFILE IN ENVIRONMENTAL LAW

The environmental principles considered in the comparative mapping project of this thesis are those that have been addressed by the European Courts and the LEC in their respective bodies of case law. There is no definitive and universal catalogue of

environmental principles for analysis,⁴ and so developments in these jurisdictions drive the selection of environmental principles for analysis in this thesis. Further, it is not possible to state definitively what an ‘environmental principle’ is or means. Due to the general and often ambiguous form of environmental principles, it is only through their legal roles and treatment in particular legal settings, such as EU and NSW law, that environmental principles develop (marginal) legal meanings.

Here environmental principles are simply introduced by name and brief description to orient the discussion. This is not to suggest that these descriptions are definitive or that the principles are equivalent or that their groupings are firmly established. As stated above, this cannot be the case for general concepts that rely on (legal) context for their meaning. Further, the general descriptions given here belie a wide range of often conflicting definitions given for environmental principles,⁵ which are possible because of their open-textured formulation. And, importantly, these principles are not introduced as *legal* principles. As indicated above, environmental principles are primarily policy ideas concerning how environmental protection and sustainable development ought to be pursued.⁶ By this it is meant that environmental principles are policies in the broad sense that they are courses of action adopted to secure, or that tend to secure, a state of affairs conceived to be desirable.⁷ Further, they are policies in the

⁴ In environmental law scholarship, there is an extensive but inconsistent group of identified ‘environmental principles’: eg N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002) 1-2; A Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ 16 *Geo Int’l Evtl L Rev* 21, 59-61. These different groupings reflect developments in a range of legal and policy contexts: see Chapter 3.

⁵ Eg Chapter 3, at text accompanying nn 42-64, 92-94, 180-181.

⁶ Environmental protection and sustainable development are not the same goals: M Silveira, ‘International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring’ (1995) 31 *Willamette L Rev* 239, 241-2.

⁷ N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1994) 261; L Soriano, ‘A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice’ (2003) 16(3) *Ratio Juris* 296, 308-9.

Dworkinian sense of ‘collective goal[s] of the community as a whole’.⁸ There is extensive jurisprudential debate on the role of policy in law, including Dworkin’s concern about the proper distinction between policy and law in judicial reasoning, which is examined in Chapter 2 to the extent that it has influenced environmental law scholarship on environmental principles.⁹ For now, the point is made that environmental principles have no pre-programmed legal identities; rather, they are generally expressed ideas of policy.

In the case law of the European Courts, six environmental principles are considered. These are the preventive principle (that pollution or other environmental harm should be prevented, as opposed to remedied once generated), the principle of rectification at source (that environmental harm should be prevented at its source), the precautionary principle (that lack of full scientific knowledge should not be a reason for postponing preventive action where there is a risk of serious environmental harm), the polluter pays principle (that polluters should pay for the environmental harm they cause), the integration principle (that environmental protection requirements should be integrated into other areas of EU policy), and the principle of sustainable development. Considering the extensive debate over the concept of sustainable development, including over its elusive definition,¹⁰ this final principle describes itself sufficiently at this introductory stage.

In the case law of the LEC, there is some overlap with these EU law environmental principles, although they are referred to as principles of ‘ecologically sustainable development’ in NSW law. Thus there are identifiable versions of the precautionary principle, the polluter pays principle and the integration principle, although

⁸ R Dworkin, *Taking Rights Seriously* (2nd edn, Duckworth, London 1978) 82.

⁹ Chapter 2(4)(a).

¹⁰ Chapter 3, at text accompanying nn 42-49.

the latter two take on explicitly different manifestations in this context. The polluter pays principle is contained within a broader ‘principle of internalisation of environmental costs’, and the integration principle here refers to the idea that economic and environmental (and sometimes social) considerations should be integrated in decision-making. Two other environmental principles also feature prominently in LEC reasoning – the principle of intergenerational equity (that current generations owe duties to future generations to conserve environmental resources), and the principle of conservation of biological diversity (as it suggests, that biodiversity should be conserved).

All these environmental principles, and others,¹¹ now have a high profile in environmental law and policy internationally, and in environmental law scholarship. As set out here, they constitute a seemingly amorphous group of policy catchphrases.¹² They are designated as ‘principles’ by their name, by the instruments in which they are found,¹³ or by commentators by way of shorthand. It is in this third sense particularly that the study and profile of ‘environmental principles’ in environmental law has flourished, in particular since the early 1990s. Thus environmental law textbooks now have chapters or sections on ‘principles’ of environmental law and policy,¹⁴ serious scholarly works on

¹¹ Eg the principle of *intra*-generational equity, the principle of sustainability, the principle of sustainable use, the principle of substitution, the proximity principle and the principle of self-sufficiency. These are discussed in Chapters 3, 4 and 5, as they arise as principles at the fringe of judicial reasoning in EU and NSW law, or otherwise in environmental policy and legal scholarship.

¹² Cf S Tromans, ‘High Talk and Low Cunning: Putting Environmental Principles into Legal Practice’ [1995] JPEL 779, 780.

¹³ Eg World Commission on Environment and Development, ‘Report of the World Commission on Environment and Development: Our Common Future’ (20 March 1987) UN Doc A/42/427, Annexe 1; the Rio Declaration also sets out its agreed environmental protection proclamations as ‘principles’: United Nations Conference on Environment and Development, ‘Rio Declaration on Environment and Development’ (14 June 1992) UN Doc A/CONF.151/26 (Vol. I), 31 ILM 874 (1992); Treaty on the Functioning of the European Union (Lisbon Treaty) (‘TFEU’) Arts 11, 191; *Protection of the Environment Administration Act 1991* (NSW) (‘POEA Act’) s6(2).

¹⁴ Eg S Bell and D McGillivray, *Environmental Law* (7th edn, OUP, Oxford 2008) 53-71; S Wolf and N Stanley, *Wolf and Stanley on Environmental Law* (Routledge-Cavendish, 2010) 14-17; J Jans and H Vedder, *European Environmental Law* (3rd edn, Europa Law Publishing, Groningen 2008) 35-47; P Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press, Cambridge 2003) 231-290; M Evans, *Principles of Environmental and Heritage Law* (Prospect Media, St. Leonards 2000) Chs 5-9.

environmental principles in law have been written,¹⁵ legal conferences and judicial symposia concerning environmental principles have been held,¹⁶ and legal academic articles and book chapters on environmental principles proliferate.¹⁷ In addition, interdisciplinary and ‘transdisciplinary’ works include legal appraisal of environmental principles.¹⁸

The profile of environmental principles in environmental law has particularly flourished internationally in recent decades because of their increasing presence in international treaties and soft law agreements, binding regional agreements, and domestic legislation.¹⁹ The wide range of ‘environmental principles’ that have been formulated in international soft law agreements concerning *sustainable development* are of particular significance, since these provide a tempting basis on which to build a universal understanding of environmental principles as legal concepts.²⁰ Much scholarly writing about environmental principles seems to assume that environmental principles are

¹⁵ de Sadeleer, *Environmental Principles* (n4); R Macrory, I Havercroft and R Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing Groningen 2004).

¹⁶ Eg M Sheridan and L Lavrysen (eds), *Environmental Law Principles in Practice* (Bruylant Brussels 2002); UNEP, ‘Johannesburg Principles on the Role of Law and Sustainable Development’, Global Judges Symposium, Johannesburg, South Africa, 18-20 August 2002. Also many interdisciplinary conferences have been held on environmental principles, including their legal appraisal, eg T O’Riordan and J Cameron (eds), *Interpreting the Precautionary Principle* (Cameron May 1994); R Harding, M Young and E Fisher, ‘Interpretation of Principles’ (Fenner Conference on the Environment - Sustainability: Principles to Practice 1994).

¹⁷ Eg Tromans, ‘High Talk’ (n12); B Boer, ‘Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action’ (1995) 31 *Willamette L Rev* 307; P Stein, ‘Turning Soft Law into Hard - An Australian Experience with ESD Principles in Practice’ (1997) 3(2) *The Judicial Review* 91; M Doherty, ‘Hard Cases and Environmental Principles: An Aid to Interpretation?’ (2004) 3 *YEEL* 57; J Verschuuren, ‘Sustainable Development and the Nature of Environmental Legal Principles’ (2006) 9(1) (*Potchefstroom Electronic Law Journal*) <<http://www.saflii.org/za/journals/PER/2006/6html>> accessed: 14 September 2010 209; G Winter, ‘The Legal Nature of Environmental Principles in International, EC and German Law’ in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004); A Epiney, ‘Environmental Principles’ in R Macrory (ed) *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing, Groningen 2006); U Antharvedi, ‘Environment: Principles and Interpretation of the Judiciary’ in U Antharvedi (ed) *Environmental Law: Principles and Governance* (Icfai University Press, Hyderabad 2007).

¹⁸ Eg S Beder, *Environmental Principles and Policies: An Interdisciplinary Introduction* (Earthscan, London 2006); A Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (Routledge-Cavendish, Abingdon 2007).

¹⁹ Above n13. See also Chapter 3.

²⁰ Chapter 3(B).

devised internationally and then translate down to regional, national and local levels for implementation.²¹ This might seem to fit the pithy aim of these international sustainable development instruments to ‘think globally, act locally’.²² However, such an aim does not necessarily imply that global thinking about environmental principles simply translates into equivalent local action in particular jurisdictions; rather it suggests that global policies are distinct from local action and that both are required. As *Agenda 21* (the sustainable development implementation document agreed at the 1992 Earth Summit in Rio de Janeiro) suggests, the nature of local action is contingent and idiosyncratic:²³

The ability of a country to follow sustainable development paths is determined to a large extent by the capacity of its people and its institutions as well as by its ecological and geographical conditions. Specifically, capacity-building encompasses the country’s human, scientific, technological, organizational, institutional and resource capabilities.

Such capabilities include legal capabilities, which thus must be understood on their own terms. On this view, the wide-ranging profile of environmental principles in environmental law instruments internationally in fact invites wide-ranging academic scrutiny of environmental principles in different legal contexts. However, as will be seen in Chapter 2, environmental law scholarship that has investigated the legal status of environmental principles in environmental law has rarely done so with the contextual consciousness suggested by this insight into local ‘capabilities’ in *Agenda 21*.²⁴

Environmental principles also have a high profile in case law across jurisdictions. They have been judicially recognised in at least three ways. First, judicial reasoning has considered environmental principles contained in legal instruments with which a court is

²¹ Chapter 2, n125 and accompanying text.

²² This aim derives from the 1972 Stockholm Conference on the Human Environment when this phrase was coined by the chairman of the scientific committee Rene Dubos, and is reflected by the detailed plan of implementing the subsequent ‘Rio principles’ in *Agenda 21*: B Ward and R Dubos, *Only One Earth: The Care and Maintenance of a Small Planet* (United Nations Conference on the Human Environment (1972 : Stockholm, Sweden) Penguin, 1972); UNCED, Report, I (1992) (*‘Agenda 21’*) eg [2.32]-[2.38], [37.1]-[37.5].

²³ *Agenda 21* [37.1].

²⁴ Chapter 2(C)(1).

relevantly concerned – this is seen in both the European courts and LEC decisions analysed in Chapters 4 and 5, in relation to the Treaty on the Functioning of the European Union (‘TFEU’) and NSW statutes respectively. Second, judicial reasoning has also been more innovative in its recognition and treatment of such principles. Thus judges of the LEC recognised environmental principles and employed them in judicial reasoning before they were included in NSW legislation,²⁵ and the Indian courts have been particularly progressive in reading environmental principles into their constitutional jurisprudence.²⁶ In public international law, Judge Weeramantry has delivered (often dissenting) opinions in the International Court of Justice declaring various environmental principles to be ‘important and rapidly developing principle[s] of contemporary environmental law’,²⁷ and important legal principles that must be recognised.²⁸

Third, judicial reasoning in particular jurisdictions has promoted the profile of environmental principles by cross-referring to judgments concerning environmental principles in other jurisdictions, building what looks like global, or transnational, jurisprudence on environmental principles independent of the legal context in which they are being used.²⁹ Examples of this are seen in LEC reasoning,³⁰ as well as in other

²⁵ Chapter 3(D)(3).

²⁶ *Vellore Citizens’ Welfare Forum v Union of India* AIR 1996 SC 2715, 2721-2 (the precautionary principle and polluter pays principle applied as rules of law by relying on constitutional provisions); *AP Pollution Control Board v Nayudu* AIR 1999 SC 812, 821. The Pakistani courts have been similarly progressive in adopting the precautionary principle as a legal rule in interpreting the Pakistan constitution: *Zia v WAPAD* PLD 1994 SC 693 [8].

²⁷ In relation to the principle of intergenerational equity: *Nuclear Tests Case (New Zealand v France)* [1995] ICJ Rep 288, 341 (dissenting opinion).

²⁸ Judge Weeramantry has identified the precautionary principle as ‘gaining increasing support as part of the international law of the environment’: *ibid* 342. In a subsequent case, he found that the principle of sustainable development is a legal ‘principle of reconciliation’ between the needs of development and the need to protect the environment: *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 90 (separate opinion).

²⁹ Boer sees this as part of the globalisation of environmental law, particularly based on common principles: B Boer, ‘The Rise of Environmental Law in the Asian Region’ (1999) 32 U Rich L Rev 1503, 1510. Also R Carnwath, ‘Judicial Protection of the Environment: At Home and Abroad’ (2004) 16(3) JEL 315; B Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005) 9(2) Asia Pac J Env’tl L 109 (n17).

jurisdictions such as India and Canada,³¹ although such reasoning is notably absent from European decisions involving environmental principles. All this judicial activity has both informed, and been informed by, legal scholarly developments with respect to environmental principles; together they have progressively built a mutually reinforcing footing for the high profile of environmental principles in environmental law generally. In short, environmental principles are part of the ‘lingua franca’ of environmental lawyers across jurisdictions internationally.³²

This high profile suggests that environmental principles are concepts that environmental lawyers need to take seriously. The following Section sets out the distinctive methodology of this thesis, which is designed as a framework for such serious scholarly analysis. In particular, it is designed to build a rigorous methodology for environmental principles as novel legal concepts in environmental law, by avoiding generalisations or assumptions about the legal nature of environmental principles and, instead, explicitly inquiring into the detail of how environmental principles operate legally within different legal systems.

C METHODOLOGY OF THESIS

The methodology of this thesis, in analysing the legal roles of environmental principles in judicial reasoning, involves two key elements: it is a doctrinal analysis of case law and it is comparative. This Section sets out what is meant by these two methodological strands to produce the mapping exercises undertaken in Chapters 4 and 5. This may seem a

³⁰ Eg *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256 [156-9] (Preston CJ draws on European cases to elucidate the precautionary principle); *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 [121] (Pain J refers to *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 174 (1994) (Supreme Court of the Philippines) to ‘underscore the importance of [the principle of intergenerational equity]’).

³¹ *Nayudu*, above n26, 821 (referring to New Zealand Decision *Ashburton Acclimatisation Society v Federated Farmers of New Zealand* [1998] 1 NZLR 78); *114957 Canada Ltee v Hudson (Town)* [2001] 2 SCR 241 [32] (referring to Indian cases, above n26).

³² Doherty, ‘Hard Cases’ (n17) 58.

simplistic exercise but it is intentionally basic, laying a methodological foundation that avoids assuming legal roles for environmental principles or assuming legal models for their analysis. Such a clear and justifiable framework of legal analysis is required in light of the legally ambiguous nature of environmental principles, their evolving roles in judicial reasoning (including the evolving bodies of law of which they form part), as well as the extensive, pluralistic and often methodologically incongruous legal scholarship concerning environmental principles, which includes assumptions that environmental principles fit established models of ‘legal principles’,³³ as well as claims that environmental principles are foundational to a new legal order.³⁴ And, as will be seen, the doctrinal maps generated through this analysis are anything but simple; the complexity of this legal situation requires a careful articulation of the analytical method employed to navigate it.

1 Doctrinal Analysis of Case Law

In analysing the roles of environmental principles in the evolving bodies of case law in EU and NSW law, this thesis does not assume established or prescribed ‘legal’ roles for environmental principles. Rather, it seeks to expose all legal roles taken on by environmental principles in judicial reasoning in these bodies of case law, through a broad doctrinal analysis. It also explicitly considers the ways in which judges *decline* to use environmental principles in their decisions, where principles thus have no legal roles.

This breadth of analysis is adopted for two reasons. First, considering the legally ambiguous and policy-based nature of principles, determining the extent of their legal relevance requires *all* roles for environmental principles in judicial reasoning to be considered – from legally relevant to legally irrelevant. Second, what is ‘legal’ within a

³³ Chapter 2(B)(4)(a).

³⁴ Chapter 2(B)(5).

particular jurisdiction may be uncertain, even according to its own doctrinal traditions and terms of reference. This is particularly problematic in the evolving case law of the LEC, due to the Court's unique institutional place in the NSW and Australian legal system,³⁵ and is also a feature of EU law, where European courts are primed with the task of interpreting and applying a relatively novel and partly unwritten 'law'.³⁶ Thus the analysis of environmental principles in the reasoning of both these courts extends to all reasoning that is doctrinal, according to the self-referential identification of what is 'legal' within a particular jurisdiction, as well as a broader appreciation of such reasoning (including developing paths of doctrinal reasoning), thereby including all the ways in which judges use, or do not use, environmental principles in their decisions.³⁷

By 'doctrine', this thesis refers to the reasoning of judges that

[embraces] all those situations in which some maxim – whether rule, principle, policy, classification or whatever – comprised in a historic legal system is supposed to *justify a decision*.³⁸

Doctrine is thus what is accepted, and also developed, as legally relevant by judges when they decide cases in a particular legal system. Doctrine is associated with maxims that are authoritative, historically accepted, binding and definitive, and which thus promote consistency and conceptual clarity in a particular system of law.³⁹ This is the body of material that legal scholars tend to focus on in their scholarship,⁴⁰ although the tendency

³⁵ Chapter 5(B).

³⁶ Treaty on European Union (Maastricht Treaty, as amended) ('TEU') Art 19.

³⁷ This approach reflects Cotterrell's understanding that closed self-referential understandings of law within a legal system might fail to account for all legal developments, 'especially in contemporary conditions of rapid legal change, policy-driven law and transnational pressures on legal regulation': R Cotterrell, 'Is there a Logic of Legal Transplants?' in D Nelken and J Feest (eds) *Towards a Sociology of Legal Adaptation* (Hart, Oxford 2001) 79.

³⁸ J Harris, *Legal Philosophies* (2nd edn, Butterworths, London 1997) 214.

³⁹ This idea of doctrine is closely associated with judicial precedent, ie judicial pronouncement of rules, standards or patterns of reasoning that are binding on future judicial decision-making, within the same and/or other related and inferior courts.

⁴⁰ Harris, *Legal Philosophies* (n38) 170. This is particularly the case in environmental law, where scholars are often eager for case law to analyse as substantive and authoritative legal development: E Fisher, 'Precaution, Precaution Everywhere: Developing a "Common Understanding" of the Precautionary

to focus on *case law* is somewhat controversial in environmental law.⁴¹ However, as set out in Section C below, the bodies of case law in EU and NSW law provide a rich resource of legal material to be studied. A doctrinal approach to their analysis is particularly valuable for two reasons.

First, such legal analysis is not prescriptive as to what does, or should, constitute environmental law universally and it can be employed in both EU and NSW law, taking into account the reasoning techniques and doctrinal traditions in each jurisdiction. The importance of this sensitivity to context is discussed further in sub-Section 2 below. Second, as suggested above, these legal contexts (EU case law, LEC reasoning) are themselves evolving so that examining the judicial treatment of environmental principles involves not simply questioning whether the principles themselves are employed doctrinally, but also reveals something of the nature of the legal settings in which they are employed. A doctrinal analysis thus widens the scope of inquiry to capture and expose applications of environmental principles which are legal in an innovative sense, reflecting the embryonic or evolving nature of these two judicial, and regulatory, settings in which they are considered.

In the EU context, for example, there is a turning point in the case law relating to the precautionary principle, where the CFI takes note of a Commission policy document on the precautionary principle,⁴² and employs it doctrinally in cases involving the principle.⁴³ This signifies an increasing significance of ‘soft law’ instruments as a form

Principle in the European Community’ (2002) 9(1) Maastricht Journal of European and Comparative Law 7, 7-8.

⁴¹ Particularly considering the interdisciplinary nature of environmental law and its socio-legal context: L Heinzerling, ‘The Environment’ in P Cane and M Tushnet (eds) *The Oxford Handbook of Legal Studies* (OUP, Oxford 2003) 702-703; J Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP, Oxford 2004) 10.

⁴² Commission of the European Communities, ‘Communication from the Commission on the Precautionary Principle’, COM (2000) 1.

⁴³ Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305: Chapter 4(F)(2)(b).

of regulatory control and consequently as a source of legal authority in EU law. This innovative step in judicial reasoning involves an evolving understanding of what is relevantly legal in EU law, which also reflects the legal treatment of an environmental principle in EU law (here the precautionary principle).

In a different way, the LEC's decisions also involve contested and evolving legal elements. In particular, the predominance and impact of its merits review decisions have created a body of judicial decisions that is not 'case law' in the Australian common law sense, and so is not conventionally legal (and not subject to mainstream academic legal analysis),⁴⁴ but which engages with conventionally legal questions (such as administrative law doctrine and statutory interpretation) and itself constitutes a source of legal authority. This is because merits review decisions in fact control and influence behaviour and are backed up by the enforcement of the Court's own authority.⁴⁵ They constitute an innovative body of judicial doctrine. In this complex legal setting, environmental principles have been critical concepts employed by the LEC in structuring its decisions – extensively in such merits review cases but also in the other traditionally 'legal' aspects of its jurisdiction – to justify decisions, connect legal issues, promote the relevance of environmental principles in all decisions made by the Court, and consciously to build a body of authoritative doctrine around them.

In short, the doctrinal framework here adopted for examining the role of environmental principles in EU and NSW case law is one that aims to catch all reasoning whereby environmental principles are involved in justifying judicial decisions, whatever the legal status or novelty of that reasoning or decision.

⁴⁴ Chapter 5, nn85-87 and accompanying text.

⁴⁵ Adapting the definition of 'law' set out in R Creyke and J McMillan, 'Soft Law v Hard Law' in L Pearson, C Harlow and M Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008) 383.

2 Comparative Analysis of Case Law

A doctrinal frame of reference is also valuable for reasons of comparative legal methodology. This is because what is ‘law’ and ‘legal’ in NSW law, as applied in the LEC, does not equate to similar concepts in EU law. Considering doctrinal reasoning – that is, reasoning that courts use to justify their decisions – allows for such difference, by not assuming that the *same* doctrine, or even understanding of doctrine, applies across these legal systems. The different jurisdictions of these two courts, and their differing roles within their respective systems of governance, indicate that no such equation should be made. This observation leads both to a caveat and to the second element in the methodology of this thesis. By way of caveat, in analysing legal developments in the EU and LEC contexts, the overlapping language of ‘law’ and ‘legal’ is used to explain judicial reasoning, but this is done in a purely jurisdiction-specific sense.

As to the next methodological element of the case law analysis of this thesis, differences between legal systems are not inimical to useful comparative study. As Orucu states:⁴⁶

In order to fulfil the requirements of scholarly comparative research, both similarities and differences must be considered, keeping in mind, however, that the purpose is not to search particularly for similarity or difference but to observe what is actually there.

The doctrinal approach of this case law mapping exercise is squarely focused on identifying the legal roles of environmental principles which are ‘there’. This sub-Section examines further how this exercise is justified and framed in comparative law terms.

A commonly cited norm of comparative law methodology is that ‘like must be compared with like’.⁴⁷ This is offended by comparing EU law and NSW law, which are

⁴⁶ E Orucu, ‘Developing Comparative Law’ in E Orucu and D Nelken (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007) 50.

very different legal systems in different governance settings. However, there is in fact no standard methodology in comparative law – the possibility of comparison being ‘dependent upon the existence and availability of data’⁴⁸ and the purpose of the comparison undertaken. In this case, the ‘data’ are the bodies of case law of these two jurisdictions, and the purpose of the exercise is not, as in some other comparative law scholarship, to examine the transplantation of a legal concept between jurisdictions (or otherwise comparatively to test common legal concepts).⁴⁹ Rather, this thesis aims to examine the myriad ways in which environmental principles might have legal roles within different legal settings, with no claims of universality of those principles or equivalence of legal settings. As Dannemann notes, ‘there is no point in comparing what is identical, and little point in comparing what has nothing in common’.⁵⁰ In this case, it is the difference of legal roles of environmental principles across jurisdictions that is instructive,⁵¹ particularly in light of their claimed common identity in environmental law scholarship and their connection otherwise to the international sustainable development agenda.

The variety of legal systems in which environmental principles might have legal roles is in fact the very point of the mapping exercise undertaken in Chapters 4 and 5.⁵²

⁴⁷ Ibid 47-8.

⁴⁸ Ibid 49.

⁴⁹ Eg D Nelken and J Feest (eds), *Adapting Legal Cultures* (Hart Oxford 2001).

⁵⁰ G Dannemann, ‘Comparative Law: Study of Similarities or Differences?’ in M Reimann and R Zimmerman (eds) *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006) 384.

⁵¹ Cf E Fisher, ‘Food Safety Crises as Crises in Administrative Constitutionalism’ (2010) 20 Health Matrix; *Journal of Law-Medicine* (forthcoming), 11.

⁵² This point is reflected in Macrory, Havercroft and Purdy (eds), *Principles of European* (n15), which examines environmental principles different European jurisdictions, although the overall aim of the work is to analyse the *same* environmental principles. See also: Sheridan and Lavrysen (eds), *Principles in Practice* (n16). The importance of comparative analysis in environmental law generally is also recognised by some scholars, eg N Robinson, ‘IUCN as Catalyst for a Law of the Biosphere: Acting Globally and Locally’ 35 *Envtl L* 249, 278-279.

This is because environmental principles can have no meaning without context.⁵³ With respect to ‘legal rules’, Legrand posits that:⁵⁴

[as] an incorporative cultural form... a rule does not have any empirical existence that can be significantly detached from the world of meanings that defines a legal culture; the part is an expression and a synthesis of the whole.

For ‘rule’ read ‘legal norm’, and Legrand’s message also has resonance for environmental ‘principles’ and the extent to which they have legal roles. This insight leads to a caution about any exercise of comparison, since cultural relativism undermines the possibilities of any comparative exercise – due to differences in context, ‘even when similar concepts are being used across jurisdictions, they may not necessarily play the same role in each’.⁵⁵ But this does not militate against their comparative study. Rather, it indicates that comparative analysis which takes into account ‘legal culture’ is required.

‘Legal culture’ reflects the amalgam of institutional, historical and power-related forces that find particular expressions in the legal language and traditions of a jurisdiction. This is not to mention broader social, political and economic forces that affect law’s development, relevance and implementation in a particular jurisdiction. An appreciation of legal culture thus determines that a comparative analysis of legal systems will reflect this range of influences. Comparative law literature does not however provide a methodological blueprint to do this. It suggests the importance of legal culture as a frame for analysis, but falls into confusion and indeterminacy in seeking to define that term.⁵⁶ Thus the concept of legal culture is defined to include a range of elements – from those ‘internal’ to a legal culture (written law, scholarly commentary, judicial decisions,

⁵³ This is firstly because of their general formulations, so they are open to different and contested interpretations, even in general terms: above n5.

⁵⁴ P Legrand, ‘What are ‘Legal Transplants’?’ in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford 2001) 59.

⁵⁵ C McCrudden, ‘Judicial Comparativism and Human Rights’ in E Orucu and D Nelken (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007) 373.

⁵⁶ D Nelken, ‘Defining and Using the Concept of Legal Culture’ in E Orucu and D Nelken (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007) 111-114; D Nelken, ‘Towards a Sociology of Legal Adaptation’ in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford 2001) 24-31.

attitudes of legal professionals, architecture of legal institutions) to those ‘external’ elements (‘legally-oriented social behaviour and attitudes’,⁵⁷ including responses of those subject to legal decisions, inclination of citizens to engage with formal legal institutions to resolve disputes, and informal organisation of behaviour within a community).

This thesis is a doctrinal rather than a socio-legal study – it exposes one view of the legal roles of environmental principles within a legal system, one which examines the evolving arguments that might be made with respect to environmental principles in a courtroom. Yet the idea of legal culture remains at the core of its comparative exercise. Its central argument is that general, ambiguous principles can only have ‘legal’ identities within a particular legal system, and those identities will be highly contingent on the legal culture of that system, albeit narrowly understood. This thesis thus adopts ‘legal culture’ as a thin concept – ‘internal legal culture’.⁵⁸ As a methodological device, this thesis adopts legal culture as the justification for studying the doctrinal roles of environmental principles in the case law of very different legal systems, and as the explanation of the differentiation between doctrinal developments in relation to environmental principles within the two legal systems studied.⁵⁹

Thus ‘legal culture’, is here shorthand for expressing the institutional, jurisdictional, constitutional and localised doctrinal constraints that shape the roles for environmental principles within judicial reasoning. This idea of legal culture goes beyond equating law with rules, and takes into account the embedded features of jurisdictions through which their legal decisions are filtered and on which they are dependent. In short, the concept of legal culture stretches the analysis of environmental

⁵⁷ Nelken, ‘Defining and Using Legal Culture’ (n56) 112 (citing Lawrence Friedman).

⁵⁸ This reflects a pattern of comparative law scholarship, albeit one subject to scholarly criticism: Cotterrell, ‘Logic of Legal Transplants?’ (n37) 71-79.

⁵⁹ Rather than as a device that exposes social phenomena in relation to law that require explanation: Nelken, ‘Defining and Using Legal Culture’ (n56) 125.

principles beyond the crude ‘spotting’ of them in legislation, cases and non-binding agreements, within and across jurisdictions, to focus analysis of them within a particular jurisdiction, and within a particular institutional setting and interpretive community in that jurisdiction.⁶⁰ It is only by such close contextual legal analysis that the legal roles of environmental principles can be accurately understood.

3 Mapping Environmental Principles Legally

In Chapters 4 and 5, the comparative doctrinal methodology set out above is applied to map the current and evolving legal roles of environmental principles in EU and LEC case law. In so mapping environmental principles, the doctrinal focus of this methodology will determine both how the relevant cases are mapped and also which cases fall within the scope of the mapping analysis.

In terms of *how* the case law is mapped, this is concerned with *judicial technique*. If doctrine is about how judges reason and justify decisions, then the techniques they use to do so must guide this doctrinal mapping exercise. It is not necessarily the type of legal action, or its outcome, which gives a doctrinal account of environmental principles (although these factors may be relevant), but the reasoning techniques adopted with respect to such principles that reveal their legal roles, along with the distinctive jurisdictional remits, and sometimes constitutional limits, of these respective courts. The mapping categories concerning environmental principles in EU and NSW case law do not match each other, demonstrating the quite different doctrinal reasoning used in both contexts within the jurisdictional and constitutional constraints of each respective court system, which thus creates different maps of environmental principles. This is an

⁶⁰ Fisher, ‘Precaution, Precaution Everywhere’ (n40) 7-8; E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007) 35-42. For ‘interpretive communities’, see below n66 and accompanying text.

unsurprising result – it is an expression of the different legal cultures involved, demonstrating the very different and contingent legal roles played by environmental principles.

As indicated above, and as will be seen in Chapters 4 and 5, the judicial treatment of environmental principles involves innovative ‘legal’ developments in both EU and NSW law. A doctrinal frame of reference thus prescribes the *scope* of the mapping exercises undertaken in each jurisdiction (that is, which cases to include) to include all such developments. This leads to a wide range of cases falling within these mapping exercises, although all are *public law* cases broadly understood.

In EU law, the cases involved are concerned with public law to the extent that they decide on the legality, under EU law, of public action (at EU and Member State level), or they are concerned with interpreting EU law as it is to be applied by administrative decision-makers and courts in Member States.⁶¹ But this body of case law concerning environmental principles is more diverse than such a broad sweep of the EU Courts’ jurisdiction suggests; it also reflects many areas of legislative competence, as well as diverse legal issues, in EU law. It thus involves internal market law, waste law, nature conservation law, competition law, law relating to the regulation of public health risks,⁶² and includes technical EU law questions of legislative interpretation, as well as competence, proportionality and other evolving tests of legality review. Just as there are many ways to skin a cat, there are many ways to put EU cases concerning environmental principles into legal ‘categories’, of either subject-matter, jurisdictional basis or legal issue. As will be seen in Chapter 4, such efforts at categorisation would present no

⁶¹ Arts 263 & 267 TFEU. Some interpretive and legality cases under these Treaty Articles may also bind actions of *individuals*, particularly in relation to the validity and interpretation of EU Regulations, Decisions or directly effective Directives, all of which are directly applicable to individuals.

⁶² Representing the perennial problem that environmental law has no discernable boundaries: M Stallworthy, *Understanding Environmental Law* (Understanding Law, Sweet & Maxwell, London 2008) (n14) Ch 1.

coherent view of the legal roles of environmental principles in EU law. However, by following the different judicial *techniques* used by the EU courts in reasoning doctrinally with respect to environmental principles (for example, whether environmental principles are used as interpretive aids or to inform legal tests), the roles of environmental principles in EU law, and their effects on EU law, can be identified. This mapping focus on judicial reasoning technique in fact reveals interaction between cases involving a variety of the different legal questions and different subject-matters listed above – the legal roles of environmental principles thus influence the evolution of EU law in their unique way.

In NSW law, a similarly broad sweep of cases is encompassed by a doctrinal appraisal of LEC case law involving environmental principles. In terms of subject-matter, these cases are primarily concerned with planning and environmental management (including of protected cultural objects), reflecting the types of statutes that refer jurisdiction to the LEC.⁶³ In terms of jurisdiction, the cases span the unique jurisdictional composition of the Court,⁶⁴ including judicial review cases (understood in common law terms), merits review cases and criminal cases. The legal issues involved in LEC cases concerning environmental principles match these jurisdictional divisions relatively neatly, again being concerned with public law in an overall sense, but more particularly with administrative law questions (judicial review), substantive ‘application’ of administrative law doctrines and legislative provisions in quasi-administrative decision-making (merits review), and sentencing decisions (criminal). In mapping the LEC case law involving environmental principles, the judicial techniques adopted by the Court again cross the Court’s jurisdictional divisions. Broadly, environmental principles are introduced doctrinally as legally required ‘relevant considerations’ in all types of

⁶³ Chapter 5, nn50-54 and accompanying text.

⁶⁴ Chapter 5, text accompanying nn40-43.

cases considered by the Court, thus informing the evolving legal jurisprudence, and also defining the institutional identity, of the Court.

To conclude, the comparative doctrinal framework adopted to define the scope and analytical method of the case law mapping exercises in this thesis is valuable, albeit complicated. This is because these exercises include wide-ranging subject-matter, jurisdictions and legal issues, and embrace novel legal developments. Comprehensively mapping legal developments relating to environmental principles involves uncharted legal territory in both EU and NSW law. Thus a ‘simple’ doctrinal analysis in each jurisdiction reveals that the legal roles played by environmental principles are complex and contingent, as are the bodies of (environmental) law of which they form part. This is a much more intricate picture of environmental principles than has been presented in environmental law scholarship to date. And it is a picture that is required to capture the detailed development of environmental law.

D WHY IS A COMPARATIVE MAPPING EXERCISE OF ENVIRONMENTAL PRINCIPLES IN *EU* AND *LEC* JUDICIAL REASONING A USEFUL EXERCISE?

As indicated at the outset of this Chapter, the reasons why the case law mapping exercises of this thesis are important are both narrow and broad. This Section focuses on the narrow importance of this comparative mapping project. But it also has a broader significance since it concerns an emerging and prominent area of environmental law – environmental principles are suggested by scholars to assist in solving environmental problems and to enhance the self-perception and legitimacy of environmental law scholarship generally. A comparative analysis of how environmental principles work legally in different jurisdictions responds to such scholarly hopes (and the methodology involved) by demonstrating that detailed contextual analysis is required in order to

determine what environmental principles are in fact doing legally. This broader significance of the mapping in this thesis is elaborated in Chapters 2 and 3.

In a narrow sense, the comparative case law mapping of EU and LEC decisions is useful to undertake because they now present a rich body of legal material available to study in order to determine the legal roles played by environmental principles. In the last 15 years, significant bodies of case law concerning environmental principles have developed in the European Courts and LEC. Here is a substantial body of legal material – judicial decisions – concerning environmental principles within distinct legal frameworks and cultures that can be studied and made sense of, providing a legal picture of how environmental principles work legally *in these contexts*. However, why study these particular bodies of case law? As suggested above,⁶⁵ environmental principles, particularly with their connection to the international sustainable development agenda, are often viewed as global phenomena with national courts around the world doing their bit to contribute to a global picture of environmental law based on principles. Against this view, isolating particular jurisdictions for legal analysis is justified in the comparative law terms discussed above, and in terms of the further legal analysis that might build on such mapping. In addition, there are good reasons for choosing these two jurisdictions in particular.

In comparative law terms, *courts* generally, and their case law, are chosen as the units of analysis for this thesis, as they are the ‘interpretive communities’ that shape the legal roles of environmental principles within the particular legal cultures analysed.⁶⁶ As Bosselmann states, ‘the importance of [environmental] principles is not so much determined by their legal status, but by their interpretation through governments, courts

⁶⁵ Above nn19-21 and accompanying text.

⁶⁶ Cotterrell, ‘Logic of Legal Transplants?’ (n37) 80-81; Legrand, ‘Legal Transplants’ (n54) 63.

and other decision-makers'.⁶⁷ And it is the interpretation by courts focused on because case law, contextually understood, can be a particularly rich source of information concerning the legal roles of environmental principles. This is because there *are* legal roles in these increasingly prolific bodies of case law that need to be appraised and understood, and also because their doctrinal mapping will provide a basis for further legal study and conclusions about environmental principles as well as environmental law scholarship.

Mapping is thus a valuable frame for broader legal academic inquiry about environmental principles. For example, many of the EU and LEC cases on environmental principles provide a window into administrative and institutional decision-making based on environmental principles.⁶⁸ The mapping of these cases might also lead to analysis of the proper role of courts in weighing or advocating particular environmental policy considerations, or of the applicability or development of jurisprudential theories for explaining the roles of environmental principles, or of potential legal arguments based on environmental principles that might be of interest or use to advocates. In *this* thesis, the mapping of legal roles of environmental principles in EU and LEC case law is framed within environmental law scholarship so as to draw broader conclusions about the state of that scholarship. As already indicated, there are significant reasons why environmental principles are prominent in environmental law scholarship, relating to the legitimacy of the subject of environmental law and its purposes. Understanding how environmental principles operate legally in some detail

⁶⁷ K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot 2008) 44.

⁶⁸ Since environmental principles represent *policy* goals, administrative and institutional decision-making is a primary site of their application. The legal review of such application by courts thus gives insight into how environmental principles are, and should be, applied in governance processes and in administration: J Scott and S Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006-7) 13 Colum J Eur L 565. This role of environmental principles in case law is at the heart of Fisher's thesis on the precautionary principle and its role in constituting administration: E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2010) (n60).

thus shines a light on these reasons, and clarifies the methodological complexity of environmental law and the challenges that must be met in the study of novel legal concepts such as environmental principles.

In choosing to study the case law of the LEC and EU courts in particular, with their sizeable bodies of case law on environmental principles, this is not to say that judicial reasoning involving environmental principles has not also developed in other national judicial settings. These include courts (and tribunals) in Australia,⁶⁹ other national courts, as well as international decision-making fora. But none of these other bodies of case law has yet been as prolific, although some courts have been very activist.⁷⁰ The case law of other jurisdictions, by contrast, involves minimal consideration of environmental principles.⁷¹ Scholars have paid a lot of attention to the *full* (or at least a broad) range of courts that have engaged in reasoning concerning environmental principles, often without much discrimination between the relevant courts.⁷² The important scholarly objective has been to find *any* judicial reasoning concerning environmental principles to point to their legal importance and status in environmental law. This objective leaves out of account the critical influence of legal cultures in shaping that legal importance and status.

⁶⁹ Note there is network of environmental *courts and tribunals* set up throughout the Australian States (Chapter 5, n19), with bodies of case law involving the environmental principles: C Burton, 'The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine' (1998) 22 Harv Envtl L Rev 509; Fisher, *Risk Regulation* (n60) Ch 6; G Bates, *Environmental Law in Australia* (6th edn, Butterworths, Sydney 2006) 129-140.

⁷⁰ Above n26.

⁷¹ Eg in UK law, *R v Secretary of State for Trade and Industry, ex parte Duddridge* The Times 26 October 1995 (CA); cf *R (Ludlam) v First Secretary of State, Derbyshire District Council* [2004] EWHC 99 (QB (Admin)) and the increasing presence of sustainable development in UK legislation: A Ross, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in the UK and Scottish Statutes' (2008) 20(1) JEL 35.

⁷² Eg de Sadeleer, *Environmental Principles* (n4) Chs 1-3; L Wyman, 'Acceptance of the Precautionary Principle - Australian v International Decision-Makers' (2001) 18 EPLJ 395; Preston, 'Role of the Judiciary in Promoting Sustainable Development' (n17); Carnwath, 'Judicial Protection of the Environment' (n29) 317.

These two courts – the European courts and the LEC – are not only uniquely prolific in their reasoning involving environmental principles but they are both relatively recent creations as courts,⁷³ and in different ways progressive in their reasoning. The former are progressive (partly through necessity) in their articulation of a modern and novel body of law – EU law – in which the activism of the ECJ is widely commented on, particularly in relation to constitutional developments.⁷⁴ This progressive agenda is broader than, and largely independent of, the Court’s reasoning concerning environmental principles. The latter Court is progressive in developing a novel institutional identity within the pre-existing NSW legal system, again through ground-breaking jurisprudence, but in a way that is much more centrally focused on environmental principles.

Despite the prolific case law concerning environmental principles in both these jurisdictions and their commonality in being interesting sites of progressive legal development, it might be questioned whether the EU and New South Wales *as jurisdictions* are appropriate legal systems to compare, in light of the legal culture justification for the comparative approach adopted in this thesis. Comparing legal cultures is not necessarily equivalent to comparing legal systems according to strict jurisdictional boundaries, since legal cultures may transcend legal boundaries.⁷⁵ However, while jurisdictional boundaries might not mark perfect limits to the legal cultures studied in EU law and NSW law,⁷⁶ they provide a good starting point for

⁷³ The present Court of Justice of the European Union (comprising the Court of Justice, the General Court and specialised courts: Treaty on European Union (Lisbon Treaty) (‘TEU’), Art 19), grew out of the Court of Justice originally created in 1952 by the Treaty Establishing the European Coal and Steel Community and subsequently given jurisdiction over the European Economic Community established by the Treaty of Rome: Convention on certain Institutions Common to the European Communities, March 25, 1957. The LEC was established by the *Land and Environment Court Act 1979* (NSW).

⁷⁴ Chapter 4, nn16-18.

⁷⁵ A-M Slaughter, ‘The Real New World Order’ (1997) 76(5) *Foreign Affairs* 183.

⁷⁶ Eg Australia is a federation of states and territories (including NSW), with discrete legal jurisdictions existing at both federal and state levels. However, these jurisdictions overlap, united in legal terms Australian constitutional law and by the convenient legal doctrine that there is one common law in Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. Similarly, there is legal

comparing legal culture, particularly because the methodological emphasis in this thesis is on doctrinal developments within those legal systems, rather than broader social, economic and political factors that might be at play. As Nelken points out:⁷⁷

Given the way [the nation state] often sets boundaries of jurisdiction, politics and language, the nation state will often serve as a relevant *starting point* for comparing legal culture.

To be more sensitive to jurisdictional boundaries actually drawn in Australia and by Member States in constituting the European Union, this thesis takes not *nation states* as units for analysis but discrete *legal jurisdictions*, defined as such according to the governance arrangements of these different nation states – the federation of states in Australia and the formation of the EU respectively.⁷⁸

The project of this thesis is thus to undertake a comparative doctrinal analysis of the case law of the EU courts and LEC involving environmental principles, with a focus on legal culture and with no preconceptions as to how this doctrinal picture does or should look. This might be an unremarkable exercise in other established areas of law, but in environmental law it is significant. This is because central to the legal ambiguity of environmental principles are the novel, idiosyncratic and evolving bodies of law in which the principles are employed, so that their mapping is required to understand the legal roles taken on by environmental principles in judicial reasoning. It is also significant because environmental law, and environmental law scholarship, has been in an almost perpetual state of ‘growing up’ for the last 30 years, with environmental principles taking on a prominent role in the quest for its maturity, as well as ‘effectiveness’, as a

interaction between EU law and the laws of EU Member States, both in terms of formal doctrine (eg Joined Cases 98 & 230/83 *van Gend en Loos v Commission* [1984] ECR 3763), and informal influences on the development of EU law (eg EU law relating to fundamental rights: P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th edn, OUP, Oxford 2008), 380-389).

⁷⁷ Nelken, ‘Defining and Using Legal Culture’ (n56) 117.

⁷⁸ The LEC occupies a unique jurisdictional space within the NSW and Australian legal system: Chapter 5(B). In the case of the EU courts, their jurisdiction sits above Member State jurisdictions, being defined and bounded by the constitutional EU Treaties, and the ECJ’s exposition of the *supreme* ‘new legal order’ within which it operates: *van Gend* (n76).

body of law. Examining their roles in different bodies of judicial reasoning thus contributes to the state of environmental law scholarship and to its self-perception. To understand this broader contribution to environmental law scholarship, Chapter 2 examines why environmental principles are so prominent in environmental law scholarship, and how the comparative doctrinal analysis undertaken in this thesis represents a step out of the methodological minefield of that scholarship.

CHAPTER 2

ENVIRONMENTAL LAW AND ENVIRONMENTAL LAW SCHOLARSHIP

A INTRODUCTION

The previous Chapter set out the mapping project and methodology of this thesis, including their importance for determining the legal roles of environmental principles within particular legal systems – since the devil of legally understanding environmental principles is in the detail – and their importance for environmental law scholarship generally. This Chapter turns to the latter broader significance of this thesis, examining the high scholarly hopes for environmental principles in environmental law and signifying the importance of mapping environmental principles in different legal cultures in light of the limitations of that hopeful scholarship. This scholarship discloses a range of purposes that environmental principles are said to fulfil in environmental law, including solving environmental problems and legitimising the subject as a scholarly discipline, but all these purposes raise methodological problems. These problems can be avoided by examining how environmental principles in fact operate legally within particular jurisdictions.

In examining scholarly hopes for environmental principles in environmental law, *environmental law* is defined as that body of law that relates to environmental problems. Defining ‘law’ in this case is no straightforward matter – it includes all forms of legal authority, which in environmental law generally comprises legislation, regulatory

regimes, and case law. But these include many novel developments and instruments that are relevantly ‘legal’, in that they influence and control behaviour and are backed up by State or institutional authority.¹ Thus decisions, documents and strategies might fall within the scope of environmental law when they are not conventionally legal in other legal subjects: for example, merits review decisions,² policy documents,³ international soft law agreements,⁴ and, of course, environmental principles (often within these unconventional sources of law). The inquiry of this thesis is to examine those aspects of environmental principles that bring them within the scope of ‘environmental law’ so understood, by means of a broad doctrinal analysis, and thus to determine their significance in this rapidly developing legal field.

To begin to determine this significance, Section B examines the reasons for the prominence of environmental principles in environmental law scholarship. Without any settled legal history of environmental principles, there has been no single path of such scholarship. Rather, there has been a range of scholarly approaches, which have advanced the legal study of environmental principles incrementally but also pluralistically. The reasons for this pluralism include an historical background in which events and scholarly thinking collided, as well as reasons driven by environmental policy and also legal reasons. In this way, there are many overlapping, and often unarticulated, motivations for the high profile of environmental principles in legal scholarship. As a result, and by way of caveat, this Chapter covers a wide range of literature – from international law scholarship to scholarship in other jurisdictions, from extra-judicial writing and policy-focused analysis to deeply theoretical work, including legal philosophy beyond environmental law. The point of looking at all this literature is not to

¹ Chapter 1 n47.

² Chapter 5(B)(3).

³ Eg Chapter 4(F)(2)(b).

⁴ Chapter 3(B).

respond directly to arguments made by all these scholars, but to indicate the pluralism of legal scholarship relating to environmental principles, and how much work environmental principles are expected to do legally by scholars.

To set out the myriad reasons for the popularity of environmental principles in environmental law scholarship, it must be appreciated that environmental principles are firstly popular as *policy* concepts. This is because they are politically convenient, and have populist appeal, as well as ethical force, as examined in Section B(2) below. This policy presence feeds into their prominence in environmental law scholarship, which in turn reflects a number of, sometimes overlapping, scholarly purposes. These purposes portray environmental principles as central concepts in environmental law for solving both environmental and legal problems. Thus there are hopeful suggestions that they can direct legal solutions to *environmental problems*. There is also a persistent strain of environmental law scholarship that demonstrates a lack of scholarly confidence in environmental law as a subject, suggesting that environmental principles can overcome the immaturity of the subject, and thus solve the *legal problems* of environmental law. Environmental principles are cast as legal principles, thus legitimising environmental law as a subject of legal scholarship,⁵ in at least three ways.

First, environmental principles might represent environmental law in the model of other, more well-established legal subjects, by emulating ‘legal principles’ that have defined jurisprudential roles in these subjects, such as legal philosophy, public international law, or EU law. Building on the legal philosophical accounts of legal principles in particular, environmental principles might provide conceptual foundations for environmental law generally and guide judicial reasoning. Second, environmental

⁵ E Fisher and others, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21(2) JEL 213, 220 and generally.

principles might also solve methodological problems in environmental law, for example by unifying environmental law to deal with its challenging multijurisdictional scope or by transcending problems of interdisciplinarity. Third, there are ambitious scholarly claims that environmental principles characterise and constitute a new form of law altogether.

This scholarly prominence is important to unravel and understand for two reasons. First, while the development of environmental law scholarship concerning environmental principles has been understandable, it can now be seen as problematic from a methodological perspective. These problems reflect the fact that, in environmental law generally, there are significant methodological challenges for the legal study of novel legal concepts,⁶ particularly those reflecting a pressing and popular policy agenda. In particular, existing scholarship on environmental principles variously involves a number of methodological limitations, often in some combination. These are examined in Section C of this Chapter, including unjustified presumptions that environmental principles are universal and equivalently legal concepts, that they are legal concepts along the lines of ‘legal principles’ in other established areas of law, that they have instrumental force in relation to environmental problems, and that they present neat solutions to problems of legal methodology and perceived immaturity in environmental law. These problems inform the methodology of this thesis as a next step in the field. The comparative doctrinal analysis involved in mapping judicial reasoning concerning environmental principles involves close investigation of discrete legal frameworks, avoiding these methodological problems, particularly by presuming no universal or legally prescribed identity for environmental principles.

The second, related reason for getting to grips with legal scholarship on environmental principles is that it demonstrates the enormous challenges taken on and

⁶ Ibid 231, 236-238.

faced by environmental law as a subject (in methodological as well as instrumental terms), with which the scholarship concerning environmental principles is fundamentally concerned. These are seen in claims that environmental principles might operate to solve the environmental problems to which environmental law relates, or that they might form the basis of a new form of law altogether. The study of environmental principles is thus not simply about the study of new legal concepts but of a subject, and the arguments and conclusions of this thesis resonate within the subject of environmental law more broadly. The central argument – that the only way to understand the legal roles of environmental principles is to understand the complexities of the legal systems in which they operate – is an argument for environmental law generally. In short, environmental law scholars need to be attentive and detailed before they are big and bold. It is in this attention and detail that the legitimacy of environmental law as a subject of scholarship resides, rather than in the existence of environmental principles as legal concepts.

B WHY SO MUCH PRINCIPLE?

In environmental law, policy and scholarship, ‘principles are in the air’.⁷ This Section considers why there is such a proliferation of diverse environmental principles in environmental law scholarship.⁸ This is important for understanding the suggested significance of environmental principles in environmental law. The significance is due to the wide range of purposes that environmental principles are expected to fulfil in environmental law, particularly as universal and legal concepts. Against this suggested significance, the mapping in Chapters 4 and 5 demonstrates the *actual* legal significance of environmental principles in different legal systems.

⁷ P Gilhuis, ‘The Consequences of Introducing Environmental Law Principles in National Law’ in M Sheridan and L Lavrysen (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002) 45.

⁸ There is a wide legal literature concerning environmental principles: Chapter 1, nn15-17.

To examine the popularity of environmental principles in environmental law, this Section first examines the historical developments that provoked the legal study of environmental principles. Second, it addresses why environmental principles are attractive and popular concepts in non-legal senses, concerning policy development, politics, populism and ethics as they relate to environmental issues. This policy background informs their legal popularity. Third, it considers why environmental principles are *legally* popular concepts, as both legal solutions to environmental problems and as solutions to legal problems with environmental law. Fourth, rather than simply addressing problems with *existing* environmental law, environmental principles are also suggested by legal scholars to form the basis for a new form of law altogether. In the latter two senses, environmental principles legitimise environmental law scholarship, and thus correct a perceived overarching legal weakness in environmental law.

1 Foundations for the Legal Study of Environmental Principles: An Historical Collision of Policy, Environmental Regulation and Legal Scholarship

The current state of scholarship on environmental principles is understandable. It is the result of an historical collision of developments in environmental law scholarship, international environmental policy and law, and the rapid expansion of environmental regulation in domestic legal settings.

When environmental law scholars impress the importance of environmental principles as legal concepts – in particular as foundations to legitimise environmental law as a discipline or even as reflecting a new form of law with an ethical basis (see sub-Sections 4 and 5 below) – this has roots in environmental law scholarship going as far back as the 1970s. At this point there had been little judicial or legislative attention paid to environmental principles as such, whether in Australia, Europe or even in the United

States, which was a pioneering jurisdiction for environmental statutes, cases and decision-making processes.⁹ Environmental law was then emerging as a subject and some leading scholars suggested that particular values or an ecological ‘ethic’ should provide the foundation for environmental law.¹⁰ This was posited as a preferable alternative to prevailing anthropocentric and economic approaches to decision-making affecting the environment, particularly in light of the ‘enormous dislocations’ that were facing the world due to environmental problems.¹¹ Such scholarly suggestions were not jurisdiction-specific and were based in environmental and legal philosophy that prioritised human relations with the natural environment,¹² as well as the integrity of that environment.¹³ It was argued that an ethical or values-based foundation for environmental law should have broad legal ramifications, including ‘sanctifying’ values, or principles, of intrinsic significance in the process of environmental decision-making.¹⁴ Such values or principles were not explicitly laid out or listed by this early scholarship,¹⁵ although the law’s accommodation of ‘fuzzy’ values such as intergenerational equity and respect for animal and plant life were central to these philosophical arguments.¹⁶ Thus

⁹ Z Plater, ‘From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law’ 27 *Loyola Los Angeles Law Review* 981; B Preston, ‘Environmental Law 1927-2007: Retrospect and Prospect’ (2007) 81 *ALJ* 616, 624-628.

¹⁰ L Tribe, ‘Ways Not To Think About Plastic Trees: New Foundations for Environmental Law’ (1974) 83(7) *Yale LJ* 1315; B Boer, ‘Social Ecology and Environmental Law’ (1984) 1 *Environmental and Planning Law Journal* 233; see, more recently, G Morgan, ‘The Dominion of Nature: Can Law Embody a New Attitude?’ (1993) 18(60) *Bulletin of the Australian Society of Legal Philosophy* 43; D Wilkinson, ‘Using Environmental Ethics to Create Ecological Law’ in J Holder and D McGillivray (eds) *Locality and Identity: Environmental Issues in Law and Society* (Ashgate, Aldershot 1999).

¹¹ M Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Cheshire Books, 1982), 21.

¹² There is a wide literature on ecological ethics, eg J Passmore, *Man’s Responsibility for Nature: Ecological Problems and Western Traditions* (Duckworth, 1974); AV Routely, ‘Human Chauvinism and Environmental Ethics’ in D Mannison, M McRobbie and R Routley (eds) *Environmental Philosophy* (Dept. of Philosophy, Research School of Social Sciences, Australian National University, 1980). Tribe draws on political and legal philosophy and environmental ethics to devise his ideal basis of environmental law: Tribe, ‘Ways Not To Think About Plastic Trees’ (n10); cf K Bosselmann, ‘Ecological Justice and Law’ in B Richardson and S Wood (eds) *Environmental Law for Sustainability: A Reader* (Hart, Oxford 2006).

¹³ Boer, ‘Social Ecology’ (n10) 246.

¹⁴ Tribe, ‘Ways Not To Think About Plastic Trees’ (n10) 1339; Boer, ‘Social Ecology’ (n10) 247.

¹⁵ Cf Tribe, ‘Ways Not To Think About Plastic Trees’ (n10) 1339-1341.

¹⁶ Eg *ibid* 1317-1319.

foundational work concerning environmental law introduced a scholarly openness and discourse in relation to environmental principles, as general ethical ideas, being core concepts in environmental law.

Alongside these scholarly developments, developments in international environmental policy and law, particularly from the early 1970s, gave environmental principles, as policy concepts,¹⁷ an increasingly prominent profile, particularly in successive attempts to agree and articulate an international framework for sustainable development.¹⁸ The prevalence of environmental principles in international declarations and agreements understandably raised questions about their legal status in international environmental law terms.¹⁹ It also raised questions as to their legal relevance within other, particularly national, legal systems.²⁰ These legal inquiries were without legal precedent and were considered against the backdrop of dramatic and often urgent environmental problems, which had prompted the need for international discussion and negotiation in the first place. As discussed below,²¹ such pressing environmental problems generated (and still generate) a desire for *legal* solutions including enforceable environmental principles, despite the lack of legal precedent.

Partly in response to this international agenda, environmental regulation generally was also becoming increasingly prolific in domestic and regional legal settings, as well as in international agreements. Such regulation often involved novel and complex

¹⁷ Chapter 1, text accompanying nn6-8.

¹⁸ Chapter 3, n9.

¹⁹ Chapter 3, nn36-38 and accompanying text.

²⁰ B Boer, 'Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action' (1995) 31 Willamette L Rev 307; S Smith, 'Ecologically Sustainable Development: Integrating Economics, Ecology, and Law' 31 Willamette L Rev 261, 266 and generally; B Preston, 'Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia' (2006) Regional Presidents Meeting, Law Society of New South Wales (<[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/\\$file/Speech_21Jul06_Preston.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/$file/Speech_21Jul06_Preston.pdf)> accessed 16 September 2010) (n8); Gilhuis, 'Consequences of Introducing Environmental Law Principles' (n7).

²¹ Below sub-Section B(3).

governance regimes and statutory frameworks. These reflected the environmental protection ideas embodied in environmental principles,²² or mentioned environmental principles explicitly – in international treaty articles or preambles,²³ in regional policy agreements²⁴ and legislative frameworks,²⁵ or increasingly as objects clauses or core decision-making concepts in national legislation.²⁶ However, as will be seen in relation to the emergence of environmental principles in the international, EU and NSW legal contexts in Chapter 3, these legal developments were non-linear, often independent, and contextually contingent. The methodological challenges faced by environmental law scholars in analysing rapid and wide-ranging (in terms of both jurisdiction and subject matter) developments are well-known,²⁷ and it is not surprising that scholars focused on environmental principles as elements of commonality in analysing such novel and speedy regulatory developments. In particular, scholars have assumed that environmental principles devised in international law agreements equate to those with similar names found in regional and national regulation, with the latter constituting localised manifestations of the former.²⁸ Thus, not only were environmental principles increasingly there to be analysed, but they also offered a tempting methodological foothold for scholars dealing with wide-ranging and rapidly evolving environmental law across jurisdictions.

²² Eg in early international law, for treaties and declarations embodying sustainable development and intergenerational equity, see Smith, 'Integrating Economic, Ecology, and Law' (n20); Chapter 3, n8. In early EU law, successive directives on waste reflected versions of the preventive principle: Council Directive (EC) 75/442 on waste [1975] OJ L194/39; Council Directive (EC) 91/156 amending Directive 75/442 on waste [1991] OJ L078/32.

²³ Eg UN Framework Convention on Climate Change (adopted 9/5/1992, entered into force 21/3/1994) (1992) 31 ILM 849, Art 3(3); other examples involving the precautionary principle, see B Preston, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2) Asia Pac J Envtl L 109, 133-136.

²⁴ 'Programme of Action of the EC on the Environment' [1973] OJ C112/1 ('1st EAP').

²⁵ TFEU, Arts 11&191(2); TEU ('Lisbon Treaty'), Recital 9. See Chapter 3(C) for the historical development of these Treaty provisions.

²⁶ Eg *Protection of the Environment Administration Act 1991* (NSW), ss6(1)(a)&(2); *Environmental Planning and Assessment Act 1979* (NSW), s5; *Resource Management Act 1991*(NZ), s5(2).

²⁷ Fisher and others, 'Maturity and Methodology' (n5) 228-231.

²⁸ Chapter 3(B).

This combination of embryonic and identity-seeking environmental law scholarship, an international sustainable development agenda expressed in terms of environmental principles, often with legal connotations, and rapid development of binding environmental regulation that reflected environment principles, thus set the scene for environmental law scholars to embrace environment principles as universal legal concepts, even while there were few judicial, legislative or scholarly developments to build on. As will be seen in the sub-Sections that follow, environmental scholars, in trying to find a scholarly foothold for appraising environmental principles, have since embraced environmental principles for a range of purposes, placing great importance on their ability to solve both environmental problems and legal problems in environmental law. In order to understand this pluralistic and ambitious scholarship, the popularity of environmental principles as *non-legal* concepts must first be examined in more detail.

2 Environmental Principles as Non-Legal Responses to Environmental Issues

A central part of this historical confluence of events in which environmental principles have developed a profile in environmental law is the fact that environmental principles are inherently attractive concepts to politicians and policymakers in non-legal senses. This is primarily because of their flexibility.²⁹ They perform a useful role in representing policy positions in respect of multi-dimensional and scientifically complex environmental problems, and also in allowing political compromise about such positions. Environmental principles also carry a desirable message in their commitment to environment protection and sustainability – they reflect popular sentiments of environmental concern and also have ethical connotations.

²⁹ S Tromans, 'High Talk and Low Cunning: Putting Environmental Principles into Legal Practice' [1995] JPEL 779, 780; G Palmer, 'New Ways to Make International Environmental Law' (1992) 86(2) The American Journal of International Law 259, 269; A Tarlock, 'Ideas Without Institutions: The Paradox of Sustainable Development' 9 Ind J Global Legal Stud 35, 36-7.

The definitional ambiguity of environmental principles³⁰ has given environmental principles widespread currency in environmental policy. Environmental principles are prevalent in policy terms because environmental problems cross jurisdictional boundaries, involve scientific uncertainties and long-term timescales – environmental principles can thus reflect common policy goals across these jurisdictional, disciplinary and temporal dimensions.³¹ In addition, they are easy to agree politically. Political positions on environmental policy are often hard-fought, particularly when there are distributional consequences or conflicts with other well-established policy areas, such as trade and investment, transport or fiscal policy. The ambiguity of environmental principles allows political actors to agree on environmental policy in general terms, while maintaining more detailed (and possibly divergent) individual policy positions. It may even be the case that political actors are not *ad idem* in their policy agreement, since environmental principles are open to different interpretations. The political expediency of environmental principles has been particularly commented on in the international arena in light of non-binding agreements such as the Rio Declaration,³² which centre on environmental principles; but it is also reflected in the NSW and EU experiences of how environmental principles have developed.³³

³⁰ Chapter 1, n5 and accompanying text.

³¹ Tromans, 'High Talk' (n29) 779.

³² N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002) 2; J Verschuuren, 'Sustainable Development and the Nature of Environmental Legal Principles' (2006) 9(1) (Potchefstroom Electronic Law Journal) <<http://www.saflii.org/za/journals/PER/2006/6.html>> accessed: 14 September 2010 209; T Stephens, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge 2009) 6. Palmer comments that the Stockholm Declaration is a 'masterpiece of international drafting. It wove the politics and the principles together in a web so tight it would not unravel': Palmer, 'New Ways' (n29) 266.

³³ In NSW, environmental principles, as 'principles of ecologically sustainable development', originated as political negotiating points between environmental groups, industry, government and other actors in a national process concerning sustainable development: Chapter 3(D)(1). In the EU, environmental principles first appeared in the politically agreed 1st EAP (above n24), although there are no detailed accounts of the political negotiations involved.

Beyond these convenient roles for environmental principles in policy formation and political negotiation, environmental principles also tap into the populist nature of environmental issues. They offer ‘sexy soundbites’ for the media coverage of such issues,³⁴ giving principles a high public profile. Less superficially, the language of ‘principles’ in relation to environmental policy also has an ethical dimension, along the lines suggested in the previous sub-Section. Environmental principles have moral weight, reflecting the inherent importance of the positions they reflect. Cameron, Pevato and Abouchar thus talk of the ‘moral codes in the language of [environmental] principles’.³⁵ Similarly, Evans argues that sustainability principles have a ‘logical and moral force’.³⁶

These non-legal roles and aspects of environmental principles explain their prevalence and significance in policy terms and popular debate. While this does not directly explain their steady legal evolution, it is part of the story,³⁷ as is demonstrated in the following sub-Section. Thus some scholars have assumed a direct link between the legal roles of environmental principles and the policy goals to which they relate, without much analytical consternation. Environmental principles are constructed as legal routes to policy outcomes in various instrumental senses. This elision of policy and law is not uncommon in environmental law,³⁸ but it sounds a warning for the doctrinal legal scholar. This is because the distinction between policy and law is an important conceptual

³⁴ Tromans, ‘High Talk’ (n29) 779.

³⁵ J Cameron, P Pevato and J Abouchar, ‘International Implementation of the Principles’ (1994) Fenner Conference on the Environment - Sustainability: Principles to Practice (Department of Environment, Sport and Territories, Australian Commonwealth Government) 112.

³⁶ M Evans, *Principles of Environmental and Heritage Law* (Prospect Media, St. Leonards 2000) 100-101. See also Gilhuis, ‘Consequences of Introducing Environmental Law Principles’ (n7) 48; Stephens, *International Courts* (n32) 6; nn78 below and accompanying text.

³⁷ This is obvious from the title of a leading scholarly work on environmental principles in environmental law: de Sadeleer, *Environmental Principles* (n32).

³⁸ Fisher and others, ‘Maturity and Methodology’ (n5) 231.

distinction in other legal subjects,³⁹ so that tracing the development of policy ideas such as environmental principles in environmental law involves novel legal analysis. This thesis accommodates such novelty through its deliberately broadly constructed doctrinal mapping of environmental principles in EU and NSW law.

It is also noted that, while the policy and political proliferation of environmental principles has been matched by their extensive legal study, this need not have been the case – there are areas of environmental decision-making and regulatory policy in which a practical proliferation of ideas and concepts has not led to a high profile in environmental law scholarship.⁴⁰ However, as examined in the following sub-Sections, there is a range of reasons why environmental law scholars have been eager to embrace environmental principles, beyond or related to the fact that some courts have taken them up extensively in their reasoning.

3 Environmental Principles as Legal Solutions to *Environmental* Problems

As a result of the pressing nature of many environmental issues, there is a desire for action, so that, once agreed on as policy positions in relation to environmental problems, environmental principles have been expected to do a lot of work as solutions to environmental problems. Thus, commentators stress that they should not be mere ‘motherhood’ statements,⁴¹ that action is now required to apply the principles, ‘not further

³⁹ Section B(4)(a) below.

⁴⁰ Eg the extensive role of models in environmental decision-making, largely ignored in environmental law scholarship: E Fisher, P Pascual and W Wagner, ‘Understanding Environmental Models in their Legal and Regulatory Context’ (2010) 22(2) JEL 251.

⁴¹ D Farrier and E Fisher, ‘Reconstituting Decision Making Processes and Structures in Light of the Precautionary Principle’ (1993) *The Precautionary Principle* (Institute of Environmental Studies, The University of New South Wales) 229.

strategies’,⁴² and that this action should be *legal*. As Cameron, Pevato and Abouchar argue:⁴³

Legal structure is necessary to shape, guide or change behaviour. No advantage is to be gained from treating these principles as being less legal because they are general, or from shifting to market mechanisms to implement them as if law or legal redress for failing to follow the principles can be avoided.’

This desire for legal action is reflected in different levels of hope for the roles that environmental principles – as universal legal concepts – can play in delivering environmental outcomes. At a general and pragmatic level, environmental law is cast instrumentally to provide a solution to environmental problems,⁴⁴ including through environmental principles. Thus Boer states that ‘environmental law is increasingly recognised as playing an important role in the *solution* to global, regional, national and local environmental problems, particularly through the concept of sustainable development’.⁴⁵ For Boer, innovative legal strategies are needed to generate a paradigm shift of behaviour within society.⁴⁶ This includes making environmental principles legal and thus legally applicable – this is an identifiable and enforceable means of propelling action to solve environmental problems, or that is the thinking. The scholarly consternation over the legal status of environmental principles in international law can be

⁴² R Harding (ed), ‘Sustainability: Principles to Practice’ (Fenner Conference on the Environment 1994) 5.

⁴³ Cameron, Pevato and Abouchar (n35) 112.

⁴⁴ This instrumental or purposive view of environmental law extends beyond environmental principles: A Tarlock, ‘The Future of Environmental Rule of Law Litigation’ (2002) 19 Pace Envtl L Rev 575, 576.

⁴⁵ B Boer, ‘The Rise of Environmental Law in the Asian Region’ (1999) 32 U Rich L Rev 1503, 1506 (emphasis added).

⁴⁶ B Boer, ‘Implementation of International Sustainability Imperatives at a National Level’ in K Ginther, E Denters and P de Waart (eds) *Sustainable Development and Good Government* (Martinus Nijhoff Publishers, London 1995) 117-118.

explained in these instrumental terms – there is a drive for normativity of environmental principles because of the ‘gap between political rhetoric and practical action’.⁴⁷

At a related theoretical level, environmental principles are posited as the critical and legally necessary link between ideal environmental outcomes and the concrete legal rules and decisions that will deliver them. Thus Verschuuren posits that environmental principles are the ‘necessary medium for ideals of sustainable development to find their way into concrete rules’ applying to activities that may harm the environment.⁴⁸ In a similar theoretical vein, in relation to judicial reasoning in the European courts, Doherty focuses on how environmental principles, as legal principles, might guide judicial decision-making in ‘hard cases’ to bring benefits not just to the European legal system but also to the *environment*.⁴⁹

At a more detailed level, some scholars focus on how law is especially suited to delivering environmental outcomes. Thus Doremus asserts that ‘nature advocates cannot afford to ignore the law’s potential to change, or to reinforce, cultural attitudes toward nature’.⁵⁰ On this view, environmental principles do their work in promoting environmental outcomes when they are legally implemented.⁵¹ This is because lawyers have special expertise in ‘structuring institutions and decision-making processes’ to achieve environmental goals embodied in environmental principles.⁵² Bosselmann goes

⁴⁷ A Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ 16 *Geo Int’l Envtl L Rev* 21, 49. See also W Lang, ‘UN Principles and International Environmental Law’ 3 *Max Planck Yrbk UN L* 171.

⁴⁸ Verschuuren, ‘Sustainable Development’ (n32) 17.

⁴⁹ M Doherty, ‘Hard Cases and Environmental Principles: An Aid to Interpretation?’ (2004) 3 *YEEL* 57, 78 and generally.

⁵⁰ H Doremus, ‘The Rhetoric and Reality of Nature Protection: Toward a New Discourse’ 57 *Wash & Lee L Rev* 11, 15.

⁵¹ As Fisher asks in relation to the concept of ‘ecologically sustainable development’ in Australian law, ‘is it not likely to depend upon integration within the legal system for its very success?’: D Fisher, *Environmental Law: Text and Materials* (Law Book Co, 1994) 440.

⁵² Smith, ‘Integrating Economic, Ecology, and Law’ (n20) 266, in relation to sustainable development in particular. In this vein, Dovers suggests that incorporating ESD principles in legislation was a significant step in ‘internalising the idea of ESD in the processes of government’: S Dovers, ‘Institutionalising ESD:

further than this and argues that law formulates ‘parameters for the direction and extent of social change’, and those parameters in environmental law are those environmental principles that are *legally recognised*.⁵³ According to some commentators and judges, this is also because *courts* have an essential role in achieving environmental outcomes, particularly sustainable development.⁵⁴ Thus the Chief Justice of Kenya has stated that:⁵⁵

In the field of environmental law, sustainable development is only achievable if there is compliance with the environmental law. It is the role of the courts to ensure this compliance and support good governance for the sustainable development for the welfare of our generation and for generations to come.

Crawford acknowledges this special role for Australian courts in resolving environmental disputes, although in more sceptical terms as to their legitimacy, but in any case as a preferred alternative to political processes that might handle scientific issues poorly or act with doubtful integrity.⁵⁶ This perceived special role for courts in achieving environmental outcomes is particularly salient with respect to the case law on environmental principles examined in Chapters 4 and 5. On this view, the NSW and European courts have an important instrumental role in achieving environmental outcomes.

This sub-Section has set out how environmental principles, formulated for the policy, political and popular reasons set out in sub-Section B(2), are cast in legal terms by scholars and judges so as to promote action to achieve good environmental outcomes. This promotion of environmental principles in legal terms helps to explain why

What Happened, What Did Not, Why and What Could Have?’ in C Hamilton and D Throsby (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998) 16.

⁵³ K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot 2008) 44.

⁵⁴ P McAuslan, ‘The Role of Courts and Other Judicial Type Bodies in Environmental Management’ (1991) 3(2) JEL 195; Preston, ‘Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia’ (n20).

⁵⁵ Quoted favourably in *Bentley v BGP Properties* [2006] NSWLEC 34; (2006) 145 LGERA 234 [142].

⁵⁶ J Crawford, ‘The Constitution’ in T Bonyhady (ed) *Environmental Protection and Legal Change* (Federation Press, Annandale 1992) 21.

environmental principles have a high profile in environmental law, but it does not reveal how environmental principles in fact work legally, as examined in Section C below. However the instrumental importance placed on environmental principles highlights their perceived importance in environmental law generally, and raises expectations about their legal roles.

4 Environmental Principles As Solutions to *Legal Problems* in Environmental Law

Environmental principles also offer a different beacon of legal hope for environmental scholars, adding another dimension to their popularity as legal concepts. Rather than offering legal solutions to *environmental problems*, environmental principles offer legal solutions to *legal problems* in environmental law. In this alternative sense, environmental principles are conceived as ‘legal principles’ – the existence of a set of legal principles in environmental law holds great appeal for environmental law scholars. This is the case for a range of (not altogether consistent) reasons, although the common link is to explain, legitimise and entrench environmental law as a legal discipline. Environmental principles are thus tied up with the perceived worth of environmental law as a scholarly enterprise.

On the one hand, environmental principles, fashioned as ‘legal principles’, can make environmental law look like other traditional legal areas, particularly within the common law legal tradition, and so give the subject a familiar and established disciplinary footing. On the other hand, environmental principles can unify environmental law not just to cast it in the mould of traditional legal areas in having foundational principles, but also to overcome the unique and significant methodological challenges faced by the subject in asserting its legal identity. Environmental principles

can also overcome methodological problems of interdisciplinarity in environmental law due to their connection to, and recognition in, other disciplines.

Environmental law scholars, explicitly and implicitly, suggest that environmental principles might fill one or both of these roles, so as to establish environmental law as a mature legal discipline. This scholarly imperative is a response to the perceived infancy of environmental law:⁵⁷ that it is a ‘relatively new and as yet “uncrystallised” branch of law’,⁵⁸ which is in danger of marginalisation and extinction.⁵⁹ Both of these legal hopes for environmental law are legitimacy claims, in which environmental principles, as universal legal principles, play a key role. The fact that environmental principles are thus used by scholars to justify the very integrity of environmental law not only makes a strong case for closely examining what environmental principles are doing in different legal systems, but it shows that legal conclusions about the roles of environmental principles from such contextual examination are conclusions about the nature of environmental law and its scholarship.

(a) Legitimacy Claim 1: Environmental Law as a Traditional Legal Area

In Western legal philosophy (Anglo-American legal philosophy in particular), ‘legal principles’ form a central, even if contested, place in the constitution of a legal system.⁶⁰

⁵⁷ Fisher and others, ‘Maturity and Methodology’ (n5) 213-226.

⁵⁸ A Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (Routledge-Cavendish, Abingdon 2007) 25.

⁵⁹ A Tarlock, ‘Is There a There There in Environmental Law?’ 19 J Land Use & Envtl L 213, 228. Philippopoulos-Mihalopoulos, *Absent Environments* (n58) 32.

⁶⁰ J Raz, ‘Legal Principles and the Limits of the Law’ [1972] Yale LJ 823; R Dworkin, *Taking Rights Seriously* (2nd edn, Duckworth, London 1978) Ch 2; cf H Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford 1994) 259-272; cf N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1994). For Dworkin, legal principles are propositions describing individual rights which *should* guide judicial decision-making, and they are distinct from rules, as well as policies, which should not inform judicial reasoning: 22-28, 84. For Hart, in response to Dworkin’s criticism that he had not adequately considered the role of legal principles in his concept of a legal system, legal principles are distinct from rules in their level of generality and in their desirability (they reflect a desirable goal or value), but their distinction from rules is otherwise not clear-cut, their function being to explain and justify reasoning about rules: 260-1. For MacCormick, principles are ‘relatively general norms which are conceived of as “rationalising” rules or sets of rules’: 232. Prominent legal philosophers from civil law

Environmental law scholars have adopted two key elements of this theoretical discourse to explain and justify the role of environmental principles within environmental law: the role of legal principles in judicial reasoning, and the role of legal principles in rationalising a body of law. Thus environmental principles, framed as legal principles, might constitute fundamental elements of environmental law, as a discrete body of law or as a coherent part of a legal system. To do this, environmental scholars have picked up salient and dominant references to legal principles in the legal philosophy literature, particularly from the work of Ronald Dworkin,⁶¹ although they do not deal within the nuances of legal philosophical debate comprehensively – arguably it would be impossible to do so considering its level of contestation.⁶² The easy elision between legal aspects of environmental principles and the jurisprudence of legal principles is demonstrated by Macrory:⁶³

[Consideration of how environmental principles are handled by courts] of necessity raises general issues concerning the legal nature of principles – a question, of course, that strays well beyond the boundaries of environmental law and touches on core questions of the nature and structure of legal systems.

Dworkin's work, as well as that of Robert Alexy,⁶⁴ is particularly influential for environmental law scholars in their appraisal of how courts do and should reason with environmental principles.⁶⁵ Dworkin's view is that legal 'principles' are distinct from

traditions have also theorised about legal principles as central elements of legal systems: R Alexy, *A Theory of Constitutional Rights* (OUP, Oxford 2002) Ch 3.

⁶¹ Dworkin, *Taking Rights Seriously* (n60).

⁶² Above (n60); L Soriano, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice' (2003) 16(3) *Ratio Juris* 296. As Alexy notes, 'in spite of its age and frequent usage, [the distinction between principles and rules] is still dogged by confusion and controversy': Alexy, *Constitutional Rights* (n60) 45.

⁶³ R Macrory, I Havercroft and R Purdy (eds), *Principles of European Environmental Law* (Europa Law Publishing Groningen 2004) 3.

⁶⁴ Alexy, *Constitutional Rights* (n60).

⁶⁵ Eg N Dhondt, 'Environmental Law Principles and the Case Law of the Court of Justice' in M Sheridan and L Lavrysen (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002); Doherty, 'Hard Cases' (n49); G Winter, 'The Legal Nature of Environmental Principles in International, EC and German Law' in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004); B Wegner, 'Principles into Practice - The German Case' in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004). Other environmental scholars rely on the distinction between principles and rules

both ‘rules’ and ‘policies’ – only rules and principles relevantly constitute the law, particularly as (should be) applied by judges, while policies reflect goals that should be pursued by political institutions alone.⁶⁶ Rules differ from principles in that rules apply in an ‘all-or-nothing fashion’,⁶⁷ while principles do not necessitate a particular decision. Principles must be taken into account, if relevant, by ‘officials’, including judges, as a ‘consideration inclining in one direction or another’, and are open for balancing when principles intersect.⁶⁸ Building on these distinctions, Dworkin’s ‘rights thesis’ articulates that judges ought to take into account arguments of principle in hard cases,⁶⁹ where principles are standards required by justice or morality, primarily representing individual or group rights.⁷⁰ In this way, legal principles are legally persuasive because of their foundation in justice or morality, and they have a dimension of ‘weight’. Thus principles can be balanced against each other and judged in terms of their relative importance when they intersect.⁷¹

For environmental scholars, Dworkin’s distinctions and thesis are useful for two reasons.⁷² First, even though environmental principles are vague and imprecise, leading to definitional difficulties,⁷³ such imprecision is not inconsistent with their being relevantly ‘legal’ and fundamental to a legal system.⁷⁴ Such ambiguity is inherent in the open-ended nature of Dworkinian principles, which are more relevantly concerned with

instinctively, with no appeal to legal philosophy: eg A Epiney, ‘Environmental Principles’ in R Macrory (ed) *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing, Groningen 2006).

⁶⁶ Above n60.

⁶⁷ Dworkin, *Taking Rights Seriously* (n60) 24.

⁶⁸ Ibid 24-26.

⁶⁹ Ibid 81.

⁷⁰ Ibid 22, 82-90.

⁷¹ Ibid 26-7.

⁷² Alexy’s theoretical account of principles also lends itself to these uses with respect to environmental principles: Winter, ‘Legal Nature of Environmental Principles’ (n65).

⁷³ Above n30.

⁷⁴ Eg Dhondt, ‘Environmental Law Principles’ (n65) 153. Cf the debate concerning the normativity of environmental principles in international environmental law: above n19.

moral foundations. Bosselmann thus argues, drawing on Dworkin's thesis, that the ethical and moral dimensions of environmental principles militate in favour of their legal recognition.⁷⁵ Second, environmental principles conceptually can and should be used to guide judicial reasoning. Thus scholars give examples of how environmental principles are used by courts to interpret uncertain rules, including statutory provisions, and to guide judicial reasoning in other ways, reflecting the interpretive role suggested for legal principles by Dworkin.⁷⁶ Further, environmental principles *should* guide the interpretation of rules and otherwise fill gaps in the legal system, particularly by refining the purposes of environmental law and employing these to resolve legal issues.⁷⁷ They should do so, in particular, by force of their moral justification,⁷⁸ again tying in with ethical claims for environmental principles and their significance.⁷⁹

Such a judicial role for principles follows Dworkin's model, and thus attracts legitimacy from authoritative legal scholarship.⁸⁰ This gives authority to environmental law as a legal discipline. In other words, if judges use environmental principles in their reasoning in the way that they use other legal principles to resolve disputes, then their reasoning might build a corpus of environmental law that has legal legitimacy and longevity. Hence Doherty's reference in the above sub-Section suggests that judicial use of environmental principles to guide reasoning might assist not simply the environment,

⁷⁵ Bosselmann, *Principle of Sustainability* (n53) 49.

⁷⁶ Eg N Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing, Groningen 2003) (n65) 154; Doherty, 'Hard Cases' (n49) 60-67.

⁷⁷ Doherty, 'Hard Cases' (n49) 78; de Sadeleer, *Environmental Principles* (n32) 264-5.

⁷⁸ Bosselmann, *Principle of Sustainability* (n53) 48-49.

⁷⁹ Above nn35-36 and accompanying text.

⁸⁰ This role for principles, *without* the element of moral justification, also follows the models of other legal philosophers, including Alexy and Hart in his response to Dworkin: Alexy, *Constitutional Rights* (n60) 57, 87-88, and Ch 3 generally; Hart, *Concept of Law* (n60) 272-6.

but also the European *legal system*.⁸¹ His implication is that such reasoning will entrench environmental principles as legal principles within a conceptually consistent legal system.

Missing from this theoretical account of how judges should reason with environmental principles is what it means for principles to be used to ‘fill gaps’ within a legal system, beyond interpreting ambiguous statutory provisions and resolving legal ‘issues’ by broadly giving direction (including being relatively balanced if more than one principle is relevant).⁸² Dworkin suggests that legal principles have a wide-ranging interpretive function in this sense – including justifying the adoption and application of new rules, in light of the moral weight of principles.⁸³ This implies a level of potentially considerable activism on the part of judges when reasoning on the basis of legal principles.⁸⁴ If these include environmental principles, Dworkin’s thesis not only gives environmental principles legitimacy within a legal system, but also bolsters the legal hopes for environmental principles discussed in the previous sub-Section (that a legal role for environmental principles might generate action). However, the generality of this theoretical perspective, as embraced by environmental scholars, undermines its prescription for how judges should reason with environmental principles in particular cases. It gives no relevantly detailed account of how legal disputes might be resolved by relying on environmental principles, beyond describing a general role of interpreting ambiguous rules and filling gaps. Almost any judicial use of environmental principles might be justified on this and similar authoritative legal models. Further, there are

⁸¹ Above n49.

⁸² As Dworkin states with considerable generality, principles are to be ‘taken into account’ if relevant as a consideration inclining in one direction or another: above n68. Cf the more detailed prescription for judicial reasoning on the basis of principles in Alexy, *Constitutional Rights* (n60), Ch 3 (in relation to the German constitution).

⁸³ Dworkin, *Taking Rights Seriously* (n60) 28.

⁸⁴ Dworkin acknowledges that using principles to guide judicial reasoning may be controversial, particularly when attributing relative weight to intersecting principles: *ibid* 26-7.

indications that this theoretical model of judicial reasoning is otherwise inapplicable for environmental principles, discussed further below.⁸⁵

The second way in which environmental principles, as legal principles, might benefit environmental law as a discipline is by giving it coherence. Environmental principles might constitute a core set of principles that define, unite and preserve environmental law as legal subject. Again, Anglo-American legal philosophy suggests this role for legal principles in giving a legal system coherence in terms of a set of norms that express ‘justifying and explanatory values of the system’.⁸⁶ Further, the very nature of traditional legal subjects implicates the necessity of such principles for an area of law. Subjects such as contract, tort and equity have a core set of legal doctrines and principles.⁸⁷ In this vein, some scholars suggest that environmental principles can rationalise environmental law by codifying the proliferation of detailed, reactive, evolving and multijurisdictional rules and regulatory frameworks that comprise environmental law (‘many laws but little law’).⁸⁸ Similarly, Verschuuren refers to environmental principles as ‘dynamic beacons in a wild ocean of ever changing concrete environmental rules’.⁸⁹ With respect to international law in particular, scholars have made similar claims that environmental principles give international environmental law a framework,⁹⁰ or that they are required to fulfil such a function.⁹¹

⁸⁵ Below Section C(3).

⁸⁶ N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1978) 177.

⁸⁷ A more subtle model of how environmental principles might be viewed as unifying foundations for environmental law is provided by the ‘maxims’ of equity, in common law systems: R Meagher, D Heydon and M Leeming, *Equity: Doctrines and Remedies* (4th edn, Butterworths, Sydney 2002) 85-121. These have been distinguished from legal rules or principles as ‘summary statement[s] of a broad theme which [underline] equitable concepts and principles’: *Corin v Patton* (1990) 169 CLR 540, 557. On this view, legal ‘maxims’ are not legal concepts in any strict theoretical or doctrinal sense.

⁸⁸ de Sadeleer, *Environmental Principles* (n32) 264-8. See also Gilhuis, ‘Consequences of Introducing Environmental Law Principles’ (n7) 50-51.

⁸⁹ Verschuuren, ‘Sustainable Development’ (n32) 39.

⁹⁰ Stephens, *International Courts* (n32) 6.

⁹¹ Palmer, ‘New Ways’ (n29) 268. He notes efforts to develop a code of principles of international environmental law have failed, including those of the International Law Commission, from 1978, and the

The importance of these potential legal benefits of environmental principles for environmental law as a subject – in legitimately guiding judicial reasoning and providing a coherent foundation for environmental law – can be seen in the strict attitude of some scholars to isolating ‘true’ environmental principles, in the sense of complying with a theoretical model of what a ‘legal principle’ is, and strictly maintaining the distinction between principles and rules.⁹² Similarly, international environmental law scholars draw on Dworkin’s distinction between principles and rules to scrutinise environmental principles as ‘general principles’ of international law.⁹³

While the focus of this sub-Section has been on jurisprudential theories of legal principles and their adoption by environmental law scholars, a similar legitimising tendency can be seen in the way that scholars draw on established doctrinal approaches to legal principles within particular legal systems to identify environmental principles as legal principles. In particular, ‘general principles’ in public international law and in EU law are drawn on by scholars to explain and justify environmental principles as ‘legal principles’ within those jurisdictions,⁹⁴ thereby legitimising environmental principles as relevantly legal within the context of those legal systems. The ways in which environmental law scholars use models of legal principles from these different

Experts Group on Environmental Law established by the World Commission on Environment and Development in 1986.

⁹² Winter, ‘Legal Nature of Environmental Principles’ (n65); Verschuuren, ‘Sustainable Development’ (n32); Bosselmann, *Principle of Sustainability* (n53) 45-57.

⁹³ P Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press, Cambridge 2003) 233; Marong, ‘From Rio to Johannesburg’ (n47) 57-8; U Beyerlin, ‘Different Types of Norms in International Environmental Law: Policies, Principles and Rules’ in D Bodansky, J Brunnâee and E Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP, Oxford 2007).

⁹⁴ Sands, *Principles of International* (n93) (public international law); P Craig, *EU Administrative Law* (OUP, Oxford 2006) (EU law); M Weimer, ‘Applying Precaution in EU Authorisation of Genetically Modified Products-Challenges and Suggestions for Reform’ 16(5) *European Law Journal* 624 (EU law). Below Section C(3). Hilson also compares environmental ‘principles’ with ‘rights’ in the EU Charter of Fundamental Rights (European Parliament, Council and Commission, ‘Charter of Fundamental Rights of the European Union’ [2000] OJ C364/1 (‘Charter’)) to ascertain the legal status of both: C Hilson, ‘Rights and Principles in EU Law: A Distinction without Foundation?’ (2008) 15(2) *Maastricht Journal of European and Comparative Law* 193. The Charter contains ‘principles’ as well as rights, and the legal distinction between the two is unclear.

jurisdictions (inappropriately) is examined further in Section C(3) below, but for now it demonstrates the tendency to draw on *existing* legal models of principles to explain the legal nature of environmental principles within those systems. Scholars are uncomfortable with a theoretical vacuum for explaining environmental principles legally – it seems to feed their fears that environmental law scholarship lacks legitimacy. However this discomfort is irrelevant, and the legitimacy concern self-fulfilling, if such models fail to reflect the reality of environmental principles in environmental law. The method and conclusions drawn by mapping environmental principles in discrete jurisdictions are thus important in appraising whether environmental law needs (and can properly use or adopt) pre-existing legal models to explain environmental principles and, further, to justify itself as a legal discipline.

(b) Legitimacy Claim 2: Environmental Principles Overcome Methodological Problems in Environmental Law

Environmental principles might unify and legitimise environmental law in another sense altogether, which does not rely on adopting authoritative Western philosophical theories of how a legal system operates and is constituted, or on other established doctrinal approaches to legal principles. Despite scholarly tendencies to borrow legal ideas from other established areas of law, environmental law *is* recognised by environmental law scholars as being different from other areas of law. In particular, it is intellectually incoherent in that it is ‘not an organic mutation of the common law, or more generally, the Western legal tradition’.⁹⁵ Instead, it is a subject beset with methodological challenges for the environmental law scholar, due to the multi-jurisdictional and interdisciplinary

⁹⁵ Tarlock, ‘Is There a There There’ (n59) 217.

nature of many environmental problems and thus the law that applies to them, and the speed and scale of environmental legal developments, amongst other things.⁹⁶

In light of these scholarly challenges, which manifest in the perceived immaturity of environmental law as a subject of scholarship,⁹⁷ environmental principles are suggested to provide a legitimising point of methodological consistency in analysing and justifying environmental law. First, environmental principles might overcome problems of studying multiple jurisdictions by providing a common legal reference point between jurisdictions. Both scholars and judges have adopted this position.⁹⁸ Second, environmental principles might provide a common legal track and point of interrelationship between the various strands of law that apply to environmental problems. For Evans, environmental principles represent an ‘integrating ethic [that] emphasises the joint over the several individual goals’ of different bodies of applicable law.⁹⁹ They are a means to overcome the challenge of ‘legal interdisciplinarity’ in environmental law.¹⁰⁰

Third, and relatedly, it is argued that environmental principles might overcome problems of dealing with rapid, reactive, detailed and novel legal developments in the environmental field. Environmental principles might ‘rationalise’ or ‘codify’ such developments, in the way suggested by de Sadeleer and Verschuuren above.¹⁰¹ Further, a ‘rational unified municipal legal system’ *demands* an ‘underlying logic’ in the form of

⁹⁶ Fisher and others, ‘Maturity and Methodology’ (n5) 228-243.

⁹⁷ Ibid 218-228.

⁹⁸ Chapter 3 n26.

⁹⁹ Evans, *Principles of Environmental* (n36) 99.

¹⁰⁰ Fisher and others, ‘Maturity and Methodology’ (n5) 230.

¹⁰¹ Above nn88-89. Also A Waite, ‘The Quest for Environmental Law Equilibrium’ 7 Env LR 34, 35-36.

environmental principles.¹⁰² Such organising principles thus integrate the subject and constitute tools for the legal scholar to appraise and evaluate legal developments.

Fourth, environmental principles might be tools for incorporating interdisciplinary elements into environmental law. Philippopoulos-Mihalopoulos suggests that the precautionary principle by its nature involves a ‘structural coupling’ of environmental law, science, politics and public participation.¹⁰³ This is one example of an extensive literature on the precautionary principle as a legal concept and its fraught interaction with science in particular.¹⁰⁴ This literature in fact shows there is no clear method by which the precautionary principle overcomes methodological problems of interdisciplinarity in environmental law,¹⁰⁵ although a great weight of expectation is placed upon it in this respect. For Bosselmann, *all* environmental principles are derivatively interdisciplinary – their respective derivation from different disciplines (science, ethics, economics etc) thus explains their qualitatively different legal natures, in terms of relevance and enforceability. However, their eventual transformation into legal principles gives them a common identity.¹⁰⁶

In these four senses, environmental principles are suggested to provide stable reference points for the study of environmental law, bolstering the legitimacy of the subject in light of its considerable methodological challenges. Some environmental law scholars go even further than adopting environmental principles as useful methodological

¹⁰² Evans, *Principles of Environmental* (n36) 99.

¹⁰³ Philippopoulos-Mihalopoulos, *Absent Environments* (n58) 136.

¹⁰⁴ Eg J Tickner and D Kriebel, ‘The Role of Science and Precaution in Environmental and Public Health Policy’ in E Fisher, J Jones and R von Schomberg (eds) *Implementing the Precautionary Principle: Perspectives and Prospects* (MPG Books, Cornwall 2006); G Majone, ‘What Price Safety? The Precautionary Principle and its Policy Implications’ (2002) 40(1) *Journal of Common Market Studies* 89; K Ladeur, ‘The Introduction of the Precautionary Principle into EU law: A Pyrrhic Victory for Environmental and Public Health Law? Decision-making Under Conditions of Complexity in Multi-level Political Systems’ (2003) 40(6) *Common Market Law Review* 1455, 1458-1462; N de Sadeleer, ‘The Precautionary Principle in EC Health and Environmental Law’ (2006) 12(2) *European Law Journal* 139, 150-162.

¹⁰⁵ E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007).

¹⁰⁶ Bosselmann, *Principle of Sustainability* (n53) 43.

tools; rather, environmental principles might constitute or represent a new form of legal order. This moves beyond legitimising *existing* environmental law as a legal discipline, and addresses its very nature and foundation, as examined in the following sub-Section.

5 Environmental Principles Constitute or Represent Environmental Law as a New Legal Order

Some environmental scholars, and international bodies, place great weight on environmental principles constituting or representing environmental law a new legal order. Identifying environmental law as a new legal order is an alternative and more radical way to legitimise environmental law as a serious intellectual discipline. Scholars making such an argument would acknowledge the unique and intellectually incoherent nature of environmental law in traditional jurisprudential terms so that positivist, Dworkinian or ‘real law’ accounts of legal principles have little relevance in ascertaining the legal role of environmental principles.¹⁰⁷ However, their view is that environmental law needs to be redefined in legal terms, either by reference to environmental problems to which environmental law relates, or by adopting a novel theoretical foundation to the subject. On both views, scholars have suggested models for environmental law that have environmental principles at their core, although, as will be seen, not necessarily the same environmental principles.

On a pragmatic view of redefining environmental law, environmental law should be shaped by the environmental problems to which it relates. According to Tarlock, the ‘extremely complex and evolving moral and scientific nature of environmental problems ensures that... environmental law will be a law about the *process of decision*, rather than

¹⁰⁷ Eg Tarlock, ‘Is There a There There’ (n59) 222-237.

a process of evolving *decision rules*'.¹⁰⁸ For such decision processes, Tarlock outlines a series of 'candidate principles of law' that have emerged in recent decades to act as 'rebuttable presumptions' in decision-making.¹⁰⁹ They can be no more than rebuttable because environmental law is a 'series of hypotheses that must be tested (and often modified) over a long time horizon by rigorous monitoring and experimentation',¹¹⁰ particularly because of the evolving scientific knowledge about environmental problems.

In contrast to this reflexive view of environmental law, but in line with its pragmatic focus on environmental problems, the 1987 Brundtland Report (the report of an international commission on environment and development, sponsored by the United Nations)¹¹¹ suggested that environmental law was deficient in failing to reflect the *interdependent nature* of the environment and biosphere to which it relates.¹¹² Environmental law should, accordingly, adopt a more holistic and unified philosophy. This philosophy was expressed in the universal legal principles annexed to the Brundtland Report,¹¹³ and in subsequent efforts to draft legal principles of environmental protection and sustainable development at the international level.¹¹⁴ In the result, a binding international convention along these lines was not agreed, but the non-binding Rio Declaration eventuated, with its set of environmental principles.¹¹⁵

¹⁰⁸ Ibid 219-220.

¹⁰⁹ These comprise: 'minimise uncertainty before and as you act'; 'environmental degradation should be a last resort after all reasonable, feasible alternatives have been exhausted'; 'risk can be a legitimate interim basis for prohibition of an activity'; 'polluters must continually upgrade waste reduction and processing technology'; 'environmental decision-making should be inclusive rather than exclusive within the limits of rationality': ibid 220.

¹¹⁰ Ibid 220.

¹¹¹ World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future' (20 March 1987) UN Doc A/42/427.

¹¹² Tarlock, 'Is There a There There' (n59) 330-334.

¹¹³ Brundtland Report (n111), Annexe 1.

¹¹⁴ Above n91.

¹¹⁵ Chapter 3, n9 and accompanying text.

Other environmental scholars have approached the (re)definition of environmental law from an explicitly theoretical point of view, suggesting that environmental principles constitute or represent a new legal foundation for environmental law in two, to some extent overlapping, senses. First, some scholars suggest that environmental law, and particularly the environmental principles at its foundation, represents a new emerging form of legal order. For de Sadeleer, this is ‘post-modern law’, which is characterised by an increase in discretion, competing norms, multiple jurisdictions and ‘openness to extra-legal spheres’, including economic, ethical and policy spheres.¹¹⁶ In this new form of law, of which environmental law is representative, environmental principles have the following critical role as legal principles:¹¹⁷

...“principles” no longer serve merely to rationalize law or to fill gaps in a given legal system... Rather, they are intended to spur public policies, to allow courts to weigh and reconcile highly divergent interests. These principles mark a policy path to be followed, outline the context within which the law-maker must act, and guide the course of his passage. [Environmental principles are] “directing principles”... As legal systems multiply and intersect, this new generation of principles plays an important role in maintaining the links among weakly structured networks, ensuring the practical effectiveness of the legal system as a whole... They are needed to introduce a degree of rationality in a world that has become Kafkaesque through the production of an excessive number of rules and a high degree of instability... They provide order to this new view of the legal system...

Another deeply theoretical viewpoint is that of Philippopoulos-Mihalopoulos, who argues that environmental law can only be understood as an autopoietic system due to its unique features, including the ‘irreducible complexity of the environment’.¹¹⁸ For Philippopoulos-Mihalopoulos, environmental law must be redefined in such a way that ‘presupposes less normativity than the average law, more cognitive flexibility, and significantly greater “fuzziness” in decision-making’.¹¹⁹ Within such a system,

¹¹⁶ de Sadeleer, *Environmental Principles* (n32).

¹¹⁷ Ibid 250-251.

¹¹⁸ Philippopoulos-Mihalopoulos, *Absent Environments* (n58) 30.

¹¹⁹ Ibid 31.

environmental principles, in particular the precautionary principle and principle of intergenerational equity, have a theoretically significant role.¹²⁰

Second, other scholars argue, not that environmental law in its current state represents a new or developing form of legal order, but that a new form of global environmental law *should* exist based on a jurisprudential concept of justice that places the legal (and ethically imperative) principle of ‘sustainability’ at its core. The aim of this proposed legal development is to make environmental protection goals legally entrenched and thus enforceable, and to reorient the social goals entrenched in laws and dispute resolution mechanisms accordingly.¹²¹ A practical application of this theoretical viewpoint is seen in a recent edited collection, which sets out, as the basis that the next (third) generation of US environmental law, concrete wide-ranging legislative proposals that define and entrench the ‘concepts’ of sustainability and intergenerational equity in order to mandate these environmental protection goals and thus bind government action.¹²²

On these more radical scholarly views, environmental principles are expected to do a lot legally. Thus environmental principles represent environmental law as a new form of law, in a pragmatic or theoretical sense, or they constitute the basis for an ideal form of law, which has ecological justice at its jurisprudential core. This latter idealistic vision links to the instrumental hopes for environmental principles set out in sub-Section 3 above, positing that the correct legal structure will lead to desired environmental outcomes. Again, these scholarly views highlight that environmental principles carry a lot of weight in environmental law scholarship. The following Section examines how this

¹²⁰ Ibid 130-6.

¹²¹ Bosselmann, *Principle of Sustainability* (n53); Bosselmann, ‘Ecological Justice’ (n12).

¹²² A Flornoy and D Driesen (eds), *Beyond Environmental Law: Policy Proposals for a Better Environmental Future* (Cambridge University Press Cambridge 2010).

weight has been misplaced, so that a comparative doctrinal analysis of environmental principles within discrete legal cultures is required, not only to determine the actual legal roles of environmental principles, but also to reflect on their roles in environmental law more broadly, in light of these high scholarly hopes.

C LIMITATIONS OF ENVIRONMENTAL LAW SCHOLARSHIP ON ENVIRONMENTAL PRINCIPLES

Section B set out a range of reasons for the popularity of environmental principles in environmental law scholarship so as to determine their perceived significance in environmental law. These included scholarly hopes that environmental principles would provide solutions to environmental problems as well as legal problems in environmental law. In light of such high hopes, the comparative mapping project of this thesis has a broader story to tell in environmental law. This Section frames that story by considering the limitations of environmental law scholarship on environmental principles in methodological terms.

In general, the high scholarly profile of environmental principles, while understandable in many ways, has failed to take into account the different legal cultures in which environmental principles may (or do) have a role. The focus on legitimising environmental law and solving environmental problems has diverted scholarly attention from environmental law as it is in fact evolving within particular legal systems. It is this diversion of attention, and associated methodological problems, which undermines the legitimacy of environmental law as a scholarly discipline, rather than the absence of any environmental principles in environmental law. This Section sets out three methodological problems that affect legal scholarship on environmental principles in this way.

First, environmental principles are often misrepresented as universal and impliedly equivalent legal concepts in environmental law scholarship. This is seen across the different reasons for the high scholarly profile of environmental principles set out in Section B above. Second, environmental principles are unjustifiably adopted as beacons of legal hope, both with respect to environmental problems and the problems of environmental law. Third, much environmental law scholarship borrows unsuitable legal concepts and methodologies from other legal subjects, including legal philosophy, public international law, and EU law, in order to discern the nature of environmental principles as ‘legal principles’. This is not explicitly justified in methodological terms, nor in most cases justifiable in the terms of these different legal subjects, and it has generated a confusing body of legal scholarship.

None of these scholarly approaches reflects the ‘truth’ with respect to environmental principles and all embody methodological flaws. The truth is that environmental principles do not come with any predetermined legal meaning, inherently self-fulfilling logical or moral force, programmed function, doctrinal history, or legal scholarly tradition. Their loose nomenclature as ‘principles’ at best connotes ideas concerning environmental protection that are *general*, but they are ideas for which there is a deep scholarly hunger, for moral, environmentalist and discipline-legitimising reasons, as seen above. Identifying environmental principles as concepts with an increasing legal presence in fact begs the question of what a ‘principle’ means in environmental law. The methodological problems of environmental law scholarship on environmental principles highlight that the nature of an environmental principle can only be determined by examining how it operates within a particular legal context. Thus the methodology of this thesis is not only justified in comparative law terms, as set out in Chapter 1, but it is a direct response to the existing legal scholarship on environmental

principles, including scholarship which places environmental principles at the heart of environmental law.

1 Assumptions that Environmental Principles are Universal Legal Concepts

The first methodologically problematic position adopted in the environmental law literature, and in some judicial reasoning, with respect to environmental principles is that they are universal legal concepts across jurisdictions.¹²³ This position allows scholars to suggest that environmental principles are solutions to environmental problems globally; that they can fit general theoretical models of ‘legal principles’; and that they can unite environmental law as a subject, whether across jurisdictions or as a new form of law altogether. According to this view, environmental principles are characterised as *universal*, *equivalent* and *legal*. As Justice Carnwarth has commented extra-judicially:¹²⁴

... the principles which should guide our response to that challenge (sustainable development, precautionary principle, public trusteeship) form a shared pool of knowledge and experience, which is now recognised in one form or another by most of the legal systems of the world.

The generality of the formulation of environmental principles allows for such an approach, as does the perception of their ‘trickling down’ from international agreements into all legal systems and contexts, examined in detail in Chapter 3.

The assumption of universality is central to an international push for the development of global ‘sustainability law’ based on environmental principles to address pressing environmental problems that transcend jurisdictional boundaries,¹²⁵ as well as

¹²³ Eg S Bell and D McGillivray, *Environmental Law* (7th edn, OUP, Oxford 2008) 53-71; de Sadeleer, *Environmental Principles* (n32); Preston, ‘Role of the Judiciary in Promoting Sustainable Development’ (n23); Boer, ‘Institutionalising Ecologically Sustainable Development’ (n20); Evans, *Principles of Environmental* (n36) 141.

¹²⁴ R Carnwarth, ‘Judicial Protection of the Environment: At Home and Abroad’ (2004) 16(3) JEL 315, 316.

¹²⁵ Boer, ‘Implementation of International Sustainability Imperatives’ (n46) 115-121; Evans, *Principles of Environmental* (n36) 85, 96; cf Bosselmann, *Principle of Sustainability* (n53) 43.

critiques that environmental principles are meaningless.¹²⁶ It also encourages the judicial cross-fertilisation of case law concerning environmental principles.¹²⁷ While legal developments in one jurisdiction can often inform legal developments in another,¹²⁸ this process is not straightforward, depending as it does on the nature and receptivity of the legal environments involved. However, judicial cross-referral to decisions of courts in other jurisdictions involving environmental principles often occurs with little analysis of those environments, and assumes their universal nature across legal contexts.¹²⁹ This reflects the international judicial agenda to promote sustainable development principles by collaboration and exchange of information amongst judges within and across regions.¹³⁰

There are three problems with assuming that environmental principles are universal legal concepts. First, it is impossible to isolate a single conceptual identity for environmental principles in environmental law scholarship. Second, history does not support claims that environmental principles are universal – they have varying derivations. And, third, comparative law warns that universal legal concepts do not exist. These three problems are explained below, followed by an appraisal of how scholars have responded to these problems by selectively analysing environmental principles, while maintaining a basic position that environmental principles are universal.

(a) Absence of Universal Legal Identity *Conceptually*

¹²⁶ The precautionary principle has been criticised as meaningless because it is used differently across jurisdictions: D Stone, 'Is There a Precautionary Principle?' (2001) 31(7) *Environmental Law Reporter* 10790; G Marchant and K Mossman, *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts* (AEI Press, Washington DC 2004); C Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, Cambridge 2005).

¹²⁷ Chapter 1, nn30-33.

¹²⁸ Consider the 'transnational juridical "conversations" or "dialogues"' that have characterised the emergence of human rights norms internationally: T Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in L Pearson, C Harlow and M Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008) 16.

¹²⁹ Eg *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 [121].

¹³⁰ UNEP, 'Johannesburg Principles on the Role of Law and Sustainable Development', Global Judges Symposium, Johannesburg, South Africa, 18-20 August 2002, Principle 4 and Programme of Work (c).

Environmental principles are not universal legal concepts because, firstly, the conceptual focus on environmental principles in environmental law scholarship is a shifting one. Some conceptual approaches focus on the ‘environmental’, or ‘environmental law’, aspect of environmental principles, while others focus on the nature of a ‘principle’.¹³¹ Others avoid ascribing a generalised meaning to environmental principles altogether.

As an example of a conceptual approach to environmental principles that focuses on their role in environmental law, Bell & McGillivray, in their leading UK environmental law textbook, state that environmental principles are:¹³²

general concepts... that can accommodate [various perspectives in approaching environmental law or decisions]... A dynamic relationship exists within these principles – which underpin environmental law at all levels – between the formulation of the law, and its implementation and enforcement.

Waite builds on this theme of principles underpinning environmental law and asserts that environmental principles are a crucial layer in the ‘environmental law model’ – they develop from the ‘environmental imperatives’ that in turn arise from the ‘laws of nature’, and they underlie the framework of legal rules.¹³³

Other scholarly works take the nature of a ‘principle’ as the analytical starting point for understanding an environmental principle conceptually. Dictionary definitions of ‘principle’ are drawn on to identify environmental principles – a principle is a ‘fundamental truth as basis of reasoning’ or ‘general law as guide to action’¹³⁴ – as are contrasts between ‘principles’ and other concepts such as objectives, ideas, rules and policies. In some cases, such contrasts are set out as statements of fact in relation to environmental principles;¹³⁵ in others, in terms of jurisprudential theory relating to ‘legal

¹³¹ Some focus on both aspects eg Tromans, ‘High Talk’ (n29) 779-780.

¹³² Bell and McGillivray, *Environmental Law* (n123) 53-4.

¹³³ Waite, ‘Quest for Environmental Law’ (n101) 35.

¹³⁴ Tromans, ‘High Talk’ (n29) 779.

¹³⁵ R Harding, M Young and E Fisher, ‘Interpretation of Principles’ (Fenner Conference on the Environment - Sustainability: Principles to Practice 1994) 4.

principles', drawing primarily on Dworkin as well as other theoretical scholars, as examined above.¹³⁶ In the latter sense, as an example, Verschuuren concludes that environmental legal principles are different from ideals (such as 'sustainable development') and have the following conceptual identity:¹³⁷

[Environmental principles] go beyond concrete rules or policy goals; instead they say something about the group of rules or policy goals, they indicate what a collection of rules has in common, or what the common goal is of a collection of rules... Principles usually contain a higher moral and/or legal value. Principles thus form a first attempt to make ideals more concrete. [However] some principles are more principle than others [sic]... Individual legal principles can be put on a sliding scale, from very abstract and of a high morality, to very concrete and precise; they cover almost all the space between an ideal, on the one hand, and a rule, on the other.

This explanation runs a fine line between jurisprudential theory and conceptual indeterminacy. Sands takes a functional as well as jurisprudential approach to identifying environmental principles as concepts, focussing on their presence in international environmental law. He finds that environmental principles are legal principles that have three general characteristics. First, they are themselves general, in the sense that they are potentially applicable to all members of the international community across a range of activities concerning all aspects of environmental protection; second, they are broadly supported, in that they are reflected in state practice; and third, they are distinct from rules in the sense set out in an early international law decision:¹³⁸

A 'rule' ... is essentially practical and, moreover, binding... [T]here are rules of art and there are rules of government [while 'principle'] expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.

While it is methodologically incongruous to equate such international law references to environmental principles in conceptual terms with other scholarly references, albeit

¹³⁶ Above Section B(4)(a).

¹³⁷ Verschuuren, 'Sustainable Development' (n32) 18, 25-6. Note this leads Verschuuren to conclude that 'each principle must be valued in its own respect': 28.

¹³⁸ Sands, *Principles of International* (n93) 231-233, citing *Gentini case, (Italy v Venezuela) M.C.C.* (1903), J Ralston and W Doyle, *Venezuelan Arbitrations of 1903 etc* (1904) 720, 725. Also Marong, 'From Rio to Johannesburg' (n47) 57-73.

expressed in generalised terms, this is what occurs in most environmental law scholarship on environmental principles, which explicitly and typically analyses environmental principles in general, as including, or being derived from, those principles in international law sources.¹³⁹ This freely multijurisdictional approach and universal basis for environmental principles allow general conceptual assertions about environmental principles to be advanced.

However, a large body of scholarly work also *limits* a conceptual understanding of environmental principles to the realm of international environmental law, along the lines set out above by Sands. Even within this legal domain, the conceptual understanding of environmental principles is inconsistent. For some scholars, environmental principles are principles of *international environmental law*;¹⁴⁰ for others, they are principles of ‘*sustainable development*’.¹⁴¹ The latter approach shifts the conceptual understanding of principles to their being constitutive of an overarching concept, or sometimes ‘principle’, of sustainable development. Some even argue that there has been a paradigmatic shift from international environmental law to international law for sustainable development, with a range of ‘legal and normative’ principles representing the latter, which have a

¹³⁹ Eg Winter, ‘Legal Nature of Environmental Principles’ (n65); Verschuuren, ‘Sustainable Development’ (n32); Chapter 3(B).

¹⁴⁰ Eg Sands, *Principles of International* 231-290; P Birnie, A Boyle and C Redgwell, *International Law & the Environment* (3rd edn, OUP, Oxford 2009) 115-204; T Stephens, ‘Multiple International Courts and the ‘Fragmentation’ of International Environmental Law’ (2006) 25 Australian Year Book of International Law 227 (n90) 236-240.

¹⁴¹ Eg G Bates, *Environmental Law in Australia* (6th edn, Butterworths, Sydney 2006) Ch 5; Bell and McGillivray, *Environmental Law* (n123) 54; Boer, ‘Institutionalising Ecologically Sustainable Development’ (n20); Preston, ‘Role of the Judiciary in Promoting Sustainable Development’ (n23); P Stein, ‘Turning Soft Law into Hard - An Australian Experience with ESD Principles in Practice’ (1997) 3(2) The Judicial Review 91; P Stein and S Mahony, ‘Incorporating Sustainability Principles into Legislation’ in P Leadbeter, N Gunningham and B Boer (eds) *Environmental Outlook No 3: Law and Policy* (Federation Press, Leichhardt 1999); Marong, ‘From Rio to Johannesburg’ (n47); Verschuuren, ‘Sustainable Development’ (n32).

different substantive emphasis in relation to environmental protection since they are centrally concerned with development.¹⁴²

Then there are scholarly approaches to environmental principles that do not focus on environmental principles conceptually at all.¹⁴³ Generally, this is a sensible approach considering the lack of conceptual clarity in the approaches so far outlined. It also allows for an appreciation of varying legal culture in understanding the legal roles of environmental principles. In short, it is not possible to ascribe a general conceptual meaning to environmental principles in environmental law, despite a widespread inclination to identify environmental principles as universal concepts. The legal identity of environmental principles must be ascertained by more detailed analytical means, which take into account legal cultures in which environmental principles have a role.

(b) Absence of Universal Legal Identity *Historically*

The second reason why environmental principles are not to be viewed as universal legal concepts is that, despite assumptions that environmental principles are commonly derived from international soft law instruments, their history is not so neat. As elaborated in Chapter 3, groupings of environmental principles are not identical across legal contexts, and different environmental principles have emerged in particular legal systems that have not been subject of international agreements and vice versa. This variation in groupings of legally relevant environmental principles is reflected in the fact that scholars themselves choose to study or acknowledge different groups of principles as ‘environmental principles’, particularly within discrete legal systems such as international

¹⁴² M Silveira, ‘International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring’ (1995) 31 Willamette L Rev 239, 241-3 and generally.

¹⁴³ Eg Doherty does not define environmental principles in general terms but finds that the role and meaning of environmental principles will only be determined by their implementation: M Doherty, ‘The Judicial Use of the Principles of EC Environmental Policy’ (2000) 2(4) Env LR 251, 263.

law or EU law.¹⁴⁴ And importantly, the process of *implementing* those principles that are internationally agreed can result in principles that look quite different within a particular legal culture (see, for example, the evolution of environmental principles in NSW law in Chapter 3), even when they are similarly named and reflect internationally agreed environmental or sustainability principles in a broad sense.

(c) Absence of Universal Legal Identity in *Comparative Law Terms*

This idea – that equivalently named environmental principles do not necessarily translate legally – is supported by those comparative law scholars who caution against a simplistic view of legal transplantation of norms, which was outlined in Chapter 1.¹⁴⁵ This is the third reason not to assume that environmental principles are universal legal concepts. In comparative law scholarship, the ‘implementation’ of suggested norms, such as environmental principles, which might be transplanted from an external legal environmental into a different legal culture, is recognised as a complex business.¹⁴⁶ Some scholars go so far as to claim that ‘[a]t best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words’.¹⁴⁷ However, as indicated above (and demonstrated in Chapter 3), there is in fact no direct vertical or horizontal transplantation of environmental principles as legal concepts between jurisdictions. This is so even where the evolution of environmental principles within a discrete legal system is influenced to some extent by external developments, as with

¹⁴⁴ Eg Dhondt, ‘Environmental Law Principles’ (n65) 146-152 (high level of protection principle, precautionary principle, preventive principle, rectification at source principle, polluter pays principle, integration principle – EU law); cf de Sadeleer, *Environmental Principles* (n32) (polluter pays principle, preventive principle, precautionary principle - generally); cf Boer, ‘Institutionalising Ecologically Sustainable Development’ (n20) 319-323 (principles of intergenerational and intra-generational equity, precautionary principle, conservation of biological diversity, internalisation of environmental costs – international law and generally).

¹⁴⁵ Above nn53-55 and accompanying text.

¹⁴⁶ O Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 MLR 1; P Legrand, ‘European Legal Systems are not Converging’ (1996) 45 Int’l & Comp LQ 52.

¹⁴⁷ P Legrand, ‘What “Legal Transplants”?’ in D Nelken and J Feest (eds) *Adapting Legal Cultures* (Hart, Oxford 2001) 63.

environmental principles in NSW law and their evolution in light of international developments involving environmental principles.¹⁴⁸ In light of such developments, the warning of comparative law scholars as to contingent legal meanings for environmental principles in different legal environments needs to be taken seriously, reinforcing the point that environmental principles have no universal legal identities.

(d) The Scholarly Response: Selective Study of Universal Principles

While some scholars and jurists do acknowledge the ‘wide variations in culture, legal systems, language and levels of development’ between different jurisdictions and countries in relation to environmental principles,¹⁴⁹ this has not halted the drive to consider and analyse environmental principles as universal legal concepts that transcend boundaries of legal jurisdiction and context.¹⁵⁰ However, the variation in environmental principles internationally is not entirely lost in the literature. Thus many academic works on environmental principles acknowledge that their treatment of particular principles is not comprehensive or definitive, but they move on from this disclaimer to analyse a selected group of principles that are ‘fundamental’,¹⁵¹ ‘worth highlighting’,¹⁵² or the ‘foremost’ principles,¹⁵³ which have the ‘broadest acceptance around the world’.¹⁵⁴ Other works avoid the problem of choosing which general group of environmental principles to study by focusing on a group of environmental principles, as indicated above, or on a

¹⁴⁸ Chapter 3(D).

¹⁴⁹ Carnwath, ‘Judicial Protection of the Environment’ (n124) 316. Also Bosselmann, *Principle of Sustainability* (n53) 43-4; Macrory, Havercroft and Purdy (eds), *Principles of European* (n63) 8; Doherty, ‘Hard Cases’ (n49) 8.

¹⁵⁰ Eg Bosselmann, *Principle of Sustainability* (n53) 44.

¹⁵¹ Tromans, ‘High Talk’ (n29) 780.

¹⁵² Preston, ‘Environmental Law 1927-2007’ (n9) 635.

¹⁵³ de Sadeleer, *Environmental Principles* (n32) 2.

¹⁵⁴ S Beder, *Environmental Principles and Policies: An Interdisciplinary Introduction* (Earthscan, London 2006) 1.

certain principle. Thus there is a huge body of legal scholarship concerning the precautionary principle,¹⁵⁵ and the principle of sustainable development.¹⁵⁶

However, in all this work, there lurks a difficult problem of methodology, with scholars ‘picking and mixing’ across jurisdictions and legal (and non-legal) contexts to analyse their environmental principle(s) of choice and to draw legal conclusions.¹⁵⁷ The result is that there are many different taxonomies of groups of environmental principles in the literature.¹⁵⁸ Some scholars seek to avoid this methodological problem by focusing on a group of environmental principles with legal relevance within one particular jurisdiction, as in Australian law or EU law (while often assuming an overall universality for environmental principles). Australian scholarship thus focuses on ‘principles of ecologically sustainable development’ (‘ESD principles’) – the NSW version of environmental principles¹⁵⁹ – while European environmental law scholarship focuses on the various environmental principles in the EU Treaties.¹⁶⁰ However, even this

¹⁵⁵ Eg E Fisher, ‘Is the Precautionary Principle Justiciable?’ (2001) 13(3) JEL 317; J Ellis, ‘Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle’ (2006) 17 Eur J Int’l L 445; I Cheyne, ‘The Precautionary Principle in EC and WTO Law: Searching for a Common Understanding’ (2006) 8(4) Env LR 257; R Lyster and E Coonan, ‘The Precautionary Principle: A Thrill Ride on the Roller Coaster of Energy and Climate Law’ (2009) 18(1) RECIEL 38.

¹⁵⁶ Eg Bosselmann, *Principle of Sustainability* (n53); M Pallemerts, ‘International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process’ (1995-6) 15 JL & Com 623 (n142); J Ruhl, ‘Sustainable Development: A Five-Dimensional Algorithm for Environmental Law’ 18 Stan Env’tl LJ 31; A Ross, ‘Modern Interpretations of Sustainable Development’ 36(1) JLS 32.

¹⁵⁷ E Fisher, ‘Precaution, Precaution Everywhere: Developing a “Common Understanding” of the Precautionary Principle in the European Community’ (2002) 9(1) Maastricht Journal of European and Comparative Law 7, 7-8, 13-14.

¹⁵⁸ Eg International Law Association has found that ‘sustainable development’ principles comprise 7 principles (duty of states to ensure sustainable use of natural resources; equity and eradication of poverty; common but differentiated responsibility; precautionary approach to human health, natural resources and ecosystems; public participation and access to information and justice; good governance; integration and interrelationship, particularly in relation to human rights and social, economic and environmental objectives): International Law Association, New Delhi Declaration on the Principles of International Law Related to Sustainable Development (London, 2002; ILA Resolution 2/2002). Boer sets out only 3 different principles of sustainability (above n144); cf Marong, ‘From Rio to Johannesburg’ (n47) 59-64.

¹⁵⁹ Eg Bates, *Environmental Law* (n141) Ch 5; Stein, ‘Turning Soft Law into Hard’ (n141); J Peel, ‘Ecologically Sustainable Development: More Than Mere Lip Service?’ (2008) 12(1) Australasian Journal of Natural Resources Law and Policy 1.

¹⁶⁰ Eg M Doherty, ‘The Status of the Principles of EC Environmental Law: Gianni Bettati against Safety High Tech’ (1999) 11(2) JEL 354; Epiney, ‘Environmental Principles’ (n65); Hilson, ‘Rights and Principles

jurisdictional basis for analysing environmental principles in legal scholarship is not watertight, and choices must still be made by legal scholars.¹⁶¹ Thus Doherty, in analysing the judicial use of EU environmental principles, states that:¹⁶²

For simplicity, these objectives, principles and criteria [found principally in Art 191 TFEU] will be referred to as the ‘environmental principles’, though there are arguably differences in status and effect between the different categories.

Further, scholarship focusing on environmental principles in a single jurisdiction often still assumes that environmental principles are more broadly universal through loose terminological and derivative associations.¹⁶³

In sum, all of the scholarly work on environmental principles has created a cluster of legal scholarship, around environmental principles generally and around particular selected principles, which has taken on a momentum of its own and has promoted the legal study of environmental principles as the study of universal legal concepts.¹⁶⁴ This momentum, however, is deficient in a legal scholarly sense. This is because environmental principles are not universal legal concepts.¹⁶⁵ To the extent that environmental principles have a legal role, such a role is to be determined by contextual legal assessment, rather than an overarching global view. Assuming universal legal identities of environmental principles overlooks the legal nuances and frameworks of particular legal systems and their legal cultures, which can be highly technical and contingent, as demonstrated in Chapters 4 and 5 in relation to the EU and NSW legal systems.

in EU Law’ (n94); E Scotford, ‘Mapping the Article 174(2) Case Law: A First Step to Analysing Community Environmental Law Principles’ (2008) 8 YEEL 1.

¹⁶¹ Eg above nn 144, 158. In this thesis, the choice is thus made to focus on those environmental principles that have been subject to judicial treatment in EU courts and the NSWLEC.

¹⁶² Doherty, ‘Judicial Use’, (n143)251-252.

¹⁶³ Eg Evans, *Principles of Environmental* (n36); Preston, ‘Environmental Law 1927-2007’ (n9) 635-637; Doherty, ‘Hard Cases’ (n49) 59.

¹⁶⁴ This has been enhanced by, and responsive to, judicial steps to develop reasoning concerning environmental principles, including by borrowing from judgments on similar-sounding principles in other jurisdictions.

¹⁶⁵ See further Chapter 3(B)-(D).

2 Environmental Principles as Unjustified Beacons of Legal Hope

As indicated in the subsections B(3) and (4) above, principles proliferate in environmental law scholarship because they might provide legal answers to both environmental problems and legal problems. However, both of these positions are methodologically problematic. In the former respect, law is assumed to have an instrumental role in responding to pressing environmental issues, but this confuses the very nature of environmental law. In the latter respect, the legitimacy of environmental law as a subject is at stake, but the role of environmental principles to integrate and legitimise environmental law as an academic discipline is overstated.

As for instrumental thinking that legal environmental principles can drive solutions to *environmental problems*, the methodological danger is that such a conclusion is too quickly drawn without appreciating the ‘complexity of the legal institutions, ideas and processes involved’, and the complexity of the environmental problems to which these relate, in casting environmental principles as legal tools.¹⁶⁶ Further, whether environmental law results in positive benefits for the environment is not strictly relevant to its analysis in doctrinal terms.¹⁶⁷ Certainly, law has a role in shaping decision-making processes and dispute resolution in relation to environmental issues, with consequential environmental effects. However, law cannot act as a form of targeted prescription medicine to cure environmental problems.¹⁶⁸ The chain of causation between legal instruments, frameworks, doctrines, decisions and real-world effects is far from

¹⁶⁶ Fisher and others, ‘Maturity and Methodology’ (n5) 234.

¹⁶⁷ Of course, this consideration is highly relevant in policy terms, and may be a more central consideration in socio-legal scholarship.

¹⁶⁸ Environmental systems are notoriously difficult to understand in terms of cause and effect: J Lovelock, *The Vanishing Face of Gaia: A Final Warning* (Penguin, New York 2010). Accordingly, Dovers identifies sustainability as a policy goal beset by enormous challenges, due to its ‘problematic spatial and temporal scales’, ‘irreversibility and urgency’, ‘connectivity’, ‘cumulative effects’, ‘new moral dimensions’ and ‘sheer novelty’, amongst other things, and that desires for ‘instant policy gratification’ through the Australian ESD process in this instance, including its ‘ESD principles’, were unreasonable: Dovers, ‘Institutionalising ESD’ (n52) 23.

straightforward,¹⁶⁹ as exemplified by the doctrinal development of environmental principles examined in EU and NSW case law in Chapters 4 and 5. With respect to environmental principles, in particular, there is much work to do in understanding the particular legal frameworks in which environmental principles might operate and what legal roles they might have within them, as well as the complexity of the environmental problems to which they apply. As set out in Chapter 1, judicial decisions are important elements, and reflections, of these frameworks, and their formulation is contingent on the internal legal culture of a particular jurisdiction. Thus, the cloak of legal enforceability is not sufficient to overcome the basic problem with environmental principles as policy goals, that is, they ‘tell us little about how to translate the concepts into practical action’.¹⁷⁰ For this reason, this thesis explicitly adopts a methodology that examines how environmental principles are applied by courts within particular legal frameworks, to understand what a ‘cloak of legal enforceability’ actually involves.

In relation to scholarly hopes of what environmental principles might do for environmental *law*, particularly that they might rationalise environmental law and give it coherence, another problem of methodology arises. This is to do with the identity of environmental law as a legal discipline. While it is important to identify legal connections within the subject, environmental law is a subject that is ‘fragmented and sprawling’.¹⁷¹ It involves a range of legal subjects (public law, criminal law, tort, property law, EU law, public international law etc), a range of jurisdictions, and a range of disciplinary lenses for its study (from doctrinal to socio-legal). In light of this incoherent reality, it is the rigorous methodological treatment of environmental law issues, rather

¹⁶⁹ Fisher, *Risk Regulation* (n105) 14-16.

¹⁷⁰ G Bates, ‘Legal Perspectives’ in S Dovers and S Wild River (eds) *Managing Australia's Environment* (The Federation Press, 2003) 293. Also Dovers, ‘Institutionalising ESD’ (n52) 23.

¹⁷¹ Fisher and others, ‘Maturity and Methodology’ (n5) 231.

than the taming of environmental law into coherent universal methodological submission, that is the priority for environmental law scholarship.¹⁷²

Thus high legal hopes for environment principles, in relation to both environmental and legal problems, do not provide a sound methodological basis for environmental law scholarship on environmental principles. Accordingly, this thesis avoids a prescriptive view of the legal roles of environmental principles and examines bodies of law in which they have had an impact, so as to map the evolving legal roles of environmental principles in particular legal contexts.

3 Crude Borrowing and Application of Legal Concepts and Methodologies from Other Legal Subjects

As set out in Section B(4)(a) above, legal scholars analysing or prescribing the legal status of environmental principles draw on at least three sets of non-environmental legal jurisprudence and doctrine concerning legal principles to establish whether and how environmental principles are ‘legal principles’.¹⁷³ These bodies of law are Western legal philosophy, public international law doctrine, and EU law doctrine, with Dworkin’s legal philosophy being the dominant frame of reference. In all three areas of law, there is well-established doctrine or long-standing jurisprudence on the nature and role of a ‘legal principle’. These contexts are drawn on by environmental law scholars singly, or in combination, to give environmental principles, and environmental law scholarship concerning them, mainstream legal authority. While these are appealing routes of legal scholarly inquiry, they are methodologically problematic.¹⁷⁴ At the very least, these

¹⁷² Ibid 220.

¹⁷³ ‘Non-environmental law’ contexts mean bodies of law that have developed in their own jurisprudential and doctrinal terms, not been concerned with environment problems in any general way.

¹⁷⁴ Philippopoulos-Mihalopoulos, *Absent Environments* (n58) 26.

bodies of legal thought and doctrine must be justified as appropriate frames of legal reference before they are adopted in appraising environmental principles.

With respect to Western legal philosophy, and particularly Dworkin's account of legal principles, there are at least two incongruous elements of his theoretical approach for analysing environmental principles. First, in contrast to Dworkin's conception of how legal principles develop and operate within a legal system, in environmental law there has been no incremental development of a body of judicial doctrine from which environmental principles might be deduced, and there is no single legal system in which environmental principles might best fit and justify the 'institutional history of [its] settled law'.¹⁷⁵ Not only do environmental principles have legal roles *across* legal systems, so that Dworkin's thesis is an inappropriate frame of reference for environmental principles *in general*, but environmental principles have not evolved from one body (or many bodies) of *judicial reasoning* and,¹⁷⁶ moreover, there is no unique and universal set of environmental principles.

Second, the purpose of Dworkin's rights thesis is to justify judicial reasoning that promotes individual rights and individual justice, particularly through legal principles that encapsulate these moral concepts. This purpose clashes with legal hopes for environmental principles because Dworkin, in formulating his thesis, explicitly excludes from its ambit of his thesis 'policies', which he defines as 'standard[s] that set out a goal to be reached, generally an improvement in some economic, political or social feature of the community'.¹⁷⁷ For Dworkin, policies are not legal norms that should inform judicial

¹⁷⁵ Hart, *Concept of Law* (n60) 263 (Hart on Dworkin). See Dworkin, *Taking Rights Seriously* (n60) generally.

¹⁷⁶ Alternatively, there is no single constitutional document setting out environmental principles as legal norms. Alexy's thesis on principles is thus also marginalised, as it is developed to analyse and prescribe reasoning about rights deriving from a constitutional instrument: Alexy, *Constitutional Rights* (n60).

¹⁷⁷ Dworkin, *Taking Rights Seriously* (n60) 22.

reasoning.¹⁷⁸ The problem in applying Dworkin's thesis to environmental principles is obvious – despite their definitional difficulties, environmental principles represent collective goals of environmental protection and sustainable development, and are thus excluded by Dworkin's thesis as being relevant and appropriate legal norms on his model of law. Some environmental scholars acknowledge this difficulty, but construe environmental principles as conferring subjective rights,¹⁷⁹ or rely on Alexy's broader idea of a legal principle instead.¹⁸⁰ Others acknowledge the difficulty but use Dworkin's ideas selectively.¹⁸¹ This latter path, in particular, is methodologically problematic with no clear justification, as is the blanket adoption of his thesis without grappling with this 'policy' problem.

Turning to international environmental law doctrines of 'general principles of law', again this framework of analysis is fraught for environmental principles. This problem has been exposed and much debated by international environmental lawyers themselves, as they struggle to apply international environmental law doctrines to determine the normativity of environmental principles.¹⁸² While some jurists simply override the controversy and make bold claims that environment principles are legal principles in international environmental law because it should be so,¹⁸³ other scholars develop new kind of international legal norms to accommodate environmental principles,¹⁸⁴ while others again turn to Dworkin to justify concluding that environmental

¹⁷⁸ Above n60.

¹⁷⁹ Hilson, 'Rights and Principles in EU Law', who argues that many environmental principles can act as 'principle' as well as 'policy' in Dworkinian terms, depending on the context: above n94. Also R Macrory, 'Principles into Practice' in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004) 3-4.

¹⁸⁰ Eg Winter, 'Legal Nature of Environmental Principles' (n65). For Alexy, principles can be related both to individual rights and to collective interests: Alexy, *Constitutional Rights* (n60) 65-66.

¹⁸¹ Eg Bosselmann, *Principle of Sustainability* (n53) 47-48.

¹⁸² Above n19.

¹⁸³ Eg *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 90 (separate opinion of Weeramantry J).

¹⁸⁴ Chapter 3, n37.

principles are general principles of international environmental law.¹⁸⁵ This latter route brings in the problems of drawing on Dworkin's theoretical work in relation to environmental principles set out above. Then there are scholars who assert that most environmental principles are *not* general principles of international environmental law, and leave them as soft law concepts of uncertain, albeit important, legal influence.¹⁸⁶

Finally, the EU law doctrine of 'general principles of law' has also been a tempting source of legal analysis for appraising environmental principles in EU law.¹⁸⁷ In EU law, general principles of law have developed, through judicial reasoning over time, to fill gaps left by successive EU Treaties in interpreting EU law and in testing the legality of EU actions. The most well-known of these principles are those of proportionality, equality and legitimate expectations,¹⁸⁸ and a significant body of doctrine has developed around these and other general principles.¹⁸⁹ The temptation to class and analyse environmental principles as such general principles of EU law has been encouraged by a particularly bold statement by the European Court of First Instance ('CFI') in *Artogodan v Commission*, describing the precautionary principle as an autonomous 'general principle of Community law'.¹⁹⁰ This description might suggest that the precautionary principle is akin to other general principles of EU law. However,

¹⁸⁵ Above n93.

¹⁸⁶ Birnie, Boyle and Redgwell, *International Law* 125-7; Palmer, 'New Ways' (n29) 266-270; F Maes, 'Environmental Law Principles, Their Nature and the Law of the Sea: A Challenge for Legislators' in M Sheridan and L Lavrysen (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002); F Boon, 'The Rio Declaration and its Influence on International Environmental Law' [1992] *Singapore Journal of Legal Studies* 347.

¹⁸⁷ Above n94. As indicated in n94 above, the Charter's 'rights' and 'principles' might also be a source of legal comparison and analysis for environmental principles in EU law, particularly as Art 37 of the Charter contains a version of the integration principle and linked principle of sustainable development, but as yet EU law doctrine concerning the legal status of the Charter principles in EU law is unclear: D Chalmers, G Davies and G Monti, *European Union Law* (2nd edn, Cambridge University Press, Cambridge 2010) 237-241.

¹⁸⁸ General principles of EU law either embody rule of law values or underlie the constitutional architecture of the EU: T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006) 4.

¹⁸⁹ *Ibid.*

¹⁹⁰ Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, T-141/00 *Artogodan v Commission* [2002] ECR II-4945 [184].

on reading the reasoning in *Artegodan* closely, the Court's focus is on the *generality* of the principle: the CFI identifies a principle that, while articulated only in Article 191 TFEU, is reflected in a range of Treaty provisions requiring a 'high level of protection' beyond the Treaty's title of environmental competence,¹⁹¹ and so it mandates related policy objectives across the domains of public health, consumer safety and the environment.¹⁹² The Court is identifying a common policy position, and its assertion that it is one of 'law' reflects its mandatory nature, as dictated by the Treaty, rather than its nature as a 'general principle' of EU law in doctrinal terms.¹⁹³ *Artegodan* is thus a curious case in which the precautionary principle looks like a legal principle in EU law terms, but in which there is something more doctrinally complicated going on.

Despite this, later EU cases and some scholars have repeated the statement that the precautionary principle, in particular, is a general principle of EU law.¹⁹⁴ Other scholars have been more careful in their appraisal, recognising that more legal evidence is required than a statement of the CFI to prove that the precautionary principle is a general principle of EU law.¹⁹⁵ The methodological danger here is that general principles in EU law doctrine have carefully developed legal natures and functions,¹⁹⁶ and it is a bold and potentially erroneous step to assume that environmental principles are legally equivalent and thus fulfil exactly the same functions in EU law, and that they should be analysed and evaluated in the same way. As explored in Chapter 4, environmental principles play

¹⁹¹ In particular, Arts 114(3), 168(1), 169(1), 191(2) TFEU (ex-Art 3(p), 152(1), and 153(1), (2) EC, as well as Art 174(2) EC).

¹⁹² *Artegodan* (n190) [182]-[183].

¹⁹³ J Scott, 'The Precautionary Principle before the European Courts' in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004) 54.

¹⁹⁴ Eg Case T-392/02 *Solvay Pharmaceuticals BV v Council* [2004] ECR II-4555 [121]; Craig, *EU Administrative Law* Ch 19; Weimer, 'Precaution in EU Authorisation of Genetically Modified Products' (n94) 630-633.

¹⁹⁵ Scott, 'The Precautionary Principle before the European Courts' (n193) 53-56; Hilson, 'Rights and Principles in EU Law' (n94) 11-19.

¹⁹⁶ In particular, general principles act as interpretive aids, grounds for reviewing the legality of EU acts, and give rise to liability claims if breached: Tridimas, *General Principles* (n188) 29-35.

more nuanced roles in EU law than are prescribed by the doctrine concerning general principles of EU law, particularly in relation to the precautionary principle and its role in legality review. Thus, a more careful appraisal of the legal roles of environmental principles in EU law is required.

The approach taken in this thesis is thus to examine the legal roles of environmental principles as they currently stand in the case law of the EU and NSW courts, without any theoretical or doctrinal presumptions of how environmental principles should operate in judicial reasoning, or indeed without presuming that environmental principles are ‘legal principles’ at all. Whether the roles of environmental principles in these two legal settings match a pre-existing theoretical or doctrinal framework, or adopt a *sui generis* legal path, is a matter for subsequent legal reflection. As a necessary first step, however, this thesis examines and sets out current legal developments for what they are.

D CONCLUSION

This Chapter has set out a range of limitations in current environmental law scholarship concerning environmental principles. This is not to deny that the progression of existing legal scholarship on environmental principles has been understandable and that some scholarship is thoughtful, and indeed inspiring, particularly in setting out where law might go on the basis of environmental principles.¹⁹⁷ However, it does add up to one overall and final limitation of existing scholarship on environment principles: it has not much further to go in its existing state. Its tendency to overlook legal culture and context and to universalise environmental principles as legal concepts, to be hopeful as to their instrumental role without close legal analysis, and to borrow uncomfortable legal

¹⁹⁷ Eg Tarlock, ‘Is There a There There’ (n59); Bosselmann, *Principle of Sustainability* (n53); Flournoy and Driesen (eds), *Beyond Environmental Law: Policy Proposals for a Better Environmental Future* (n122).

methodologies and concepts, all limit how legal analysis of environmental principles might develop. And, at worst, these limitations misrepresent environmental principles and the environmental law of which they form part.

However, the purpose of this exercise has been to understand, rather than to critique, the state of legal scholarship on environmental principles. This understanding has two implications. First, it guides the next step to be taken in analysing the legal roles of environmental principles, which should be taken to avoid, or to take into account, these methodological problems. Critical reflection on methodology is now required. The next scholarly step should be taken in light of *concrete* legal frameworks and developments, and in a manner that is sensitive to legal culture. Environmental principles have been theorised and prescribed sufficiently. Chapters 4 and 5 take such a step in comparatively mapping case law developments in the EU courts and the LEC.

Second, the reasons for the high profile of environmental principles in environmental law scholarship set out in this Chapter indicate that comparative doctrinal analysis of environmental principles in NSW and EU law is significant for environmental law, and its scholarship, more broadly. This is because environmental law scholars expect environmental principles to do a lot of work in environmental law, and an appraisal of the work they are in fact doing within legal systems is an empirical reflection of how realistic those expectations are. Further, to the extent that environmental principles are adopted in (often universal) legal terms to justify environmental law as a discipline, an empirical reality check that environmental principles operate differently within different legal systems, demonstrated by the mapping exercises in Chapters 4 and 5, does not imply that environmental law lacks scholarly legitimacy. Rather, it demonstrates that doctrinal and legal pluralism is inherent in environmental law that crosses jurisdictional boundaries, and that this reality must be factored into the

methodology of environmental scholars in examining new legal phenomena such as environmental principles. Legitimacy of scholarship comes from methodological rigour, and not from environmental principles constituting mirrors of existing bodies of law, short-cuts to methodological complexity, instrumental solutions to environmental problems, or revolutionising existing legal structures to reflect an alternate, environmentally-friendly worldview.

CHAPTER 3

VARYING LEGAL CONTOURS OF ENVIRONMENTAL PRINCIPLES ACROSS JURISDICTIONS: EXAMINING THE MAPPING CONTEXTS

A INTRODUCTION

Chapters 1 and 2 made a case for analysing the legal roles of environmental principles by mapping their legal evolution, in particular their doctrinal judicial treatment, within discrete legal cultures. Such contextual analysis is required for novel legal concepts in environmental law, considering the methodological challenges involved in studying the subject. It is required for environmental principles in particular because there is no long-standing legal history or authoritative legal doctrine relating to them, and they are neither conceptually identifiable as ‘principles’ nor clearly defined in the abstract, despite the fact that they are described often in universal and ambitious legal terms in environmental law scholarship. However, environmental principles do have an increasing presence in various legal systems, including in public international law – often said to be the source of their universal identity – as well as in the two jurisdictions mapped in Chapters 4 and 5: EU and New South Wales law.

This Chapter identifies the groups of environmental principles that have legal roles in each of these three jurisdictions and examines how those roles have evolved. It shows in

some detail the ambiguous and contested meanings and varying nature of environmental principles in each legal setting, showing how environmental principles are shaped by, and are expressions of, the very different legal cultures in which they have roles. This detailed background is set out both to demonstrate the importance of the comparative doctrinal mapping method of this thesis, and also to lay the foundations for that method, leading into the mapping exercises that follow in Chapters 4 and 5. This Chapter thus contributes to both the broad and narrow aims of this thesis. In broad terms, it confirms the methodological argument in Chapter 2 that environmental principles are not universal legal concepts for which there is a settled analytical framework, calling into question the high hopes for environmental principles in environmental law scholarship. The jurisdictional analysis in this Chapter highlights the importance of mapping environmental principles within particular legal contexts, showing that the environmental principles that are legally relevant in EU and NSW law are not equivalent, neither to each other nor to those environmental principles in international law, despite some interactions between these jurisdictions. They are the product of, and exist within, very different legal environments. In narrow terms, the analysis of this Chapter is the first step in determining the legal roles played by environmental principles in EU and NSW case law. The judicial treatment of environmental principles in EU and NSW law can only be understood in light of their historical legal development and the relevant idiosyncratic legal frameworks in each legal culture, as set out in this Chapter.

To build this picture of varying environmental principles within different legal cultures, Section B firstly outlines environmental principles in public international law, examining their grouping, meanings, legal status and evolution within that legal setting, from which ‘global’ environmental principles are said, by some scholars, to proliferate universally.

Even within this context, environmental principles have contested meanings and are difficult to isolate as a group. The examination of environmental principles in international law is necessarily limited, since this thesis does not comprehensively map relevant legal developments in this context;¹ rather, Section B both contextualises environmental law scholarship that relies heavily on international law developments in examining environmental principles and provides contrasts (and some links) to developments in EU and NSW law. Sections C and D then contrast this legal picture of environmental principles with the legal development of environmental principles in both EU and NSW law, outlining the (different) groups of environmental principles that are legally relevant in each jurisdiction, as well as the varying legal frameworks, historical factors and institutional structures which have shaped (and in the case of the courts as legal institutions, have been shaped by)² their development. These portrayals of environmental principles in different legal settings undermine scholarly assumptions that environmental principles comprise a readily identifiable and universal set of concepts for legal analysis.³ Rather, environmental principles are concepts that are grouped and identified according to their evolution in particular legal contexts and cultures.

There are many so-called environmental principles that have a presence in various jurisdictions internationally – from the precautionary principle, the preventive principle and the polluter pays principle, to the principle of intergenerational equity, the principle of

¹ Although there is no large body of international case law involving environmental principles to map.

² Particularly in the case of the LEC: Chapter 5.

³ Reinforcing the methodological arguments against such assumptions in Chapter 2(C)(1).

integration, and the broad principle of sustainable development.⁴ The analysis of such environmental principles across the three jurisdictions in this Chapter takes the term ‘environmental principle’ at its broadest construction, reflecting the loose terminological and jurisdictional references to such principles that pervade the literature. On this view, the Chapter demonstrates that the precise formulations of such principles are inconsistent, their meanings unclear or contested, and the groupings of environmental principles vary both within and across the different jurisdictions analysed. This is not to say that environmental principles are of no use legally; indeed, they may be very useful and influential concepts in environmental law.⁵ However, any such usefulness or influence is misstated if it fails to take into account how environmental principles vary considerably in their legal manifestations and contexts across jurisdictions.

This variance between environmental principles depends on the legal, institutional and political peculiarities of each jurisdiction, as well as the evolution of particular environmental principles within different bodies of law over time. Demonstrating these factors is a relatively lengthy exercise, particularly in NSW law, due to the unique and often convoluted circumstances that have led to the legal development of environmental principles in these different jurisdictions. While such evolution is sometimes responsive to developments within other jurisdictions, whether at the international, regional or national level, there is no direct transplantation of environmental principles across jurisdictions or a cascading down of such principles from international law into regional and domestic legal

⁴ The list could go on: Chapter 1, nn10-11 and accompanying text.

⁵ As in fact demonstrated in Chapters 4 and 5.

systems. That is, there is no direct and formulaic *horizontal* or *vertical* transplantation of environmental principles between jurisdictions. Rather, there is a plurality of contexts in which environmental principles have legal roles and form groups as ‘environmental principles’. Such groups of environmental principles have evolved in idiosyncratic and non-linear ways, so that the environmental principles that have developed in each jurisdiction are expressions of the legal cultures of which they form part. This sets the scene of the differing legal cultures in which judges reason with respect to environmental principles in EU and NSW law, for the purposes of mapping the respective bodies of case law in Chapters 4 and 5.

B ENVIRONMENTAL PRINCIPLES IN INTERNATIONAL LAW

Common to many environmental principles is their explicit articulation in a number of key United Nations-sponsored international treaties, declarations and reports on environmental protection and sustainable development. Such international representation of environmental principles is the main driver of scholarly and judicial assumptions that there are universal concepts of environmental principles in environmental law.⁶ This Section examines the legal evolution of environmental principles in public international law in order to examine their grouping, meanings and legal status in this setting. As will be seen, all these attributes of environmental principles as legal concepts in international law are ambiguous, contested or

⁶ Eg L Godden and J Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (OUP, South Melbourne 2010) 239-244; B Boer, ‘Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action’ (1995) 31 *Willamette L Rev* 307; S Smith, ‘Ecologically Sustainable Development: Integrating Economic, Ecology, and Law’ 31 *Willamette L Rev* 261; B Preston, ‘The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific’ (2005) 9(2) *Asia Pac J Envtl L* 109, 114-129; P Gilhuis, ‘The Consequences of Introducing Environmental Law Principles in National Law’ in M Sheridan and L Lavrysen (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002).

evolving. Thus any suggestion that environmental principles are readily identifiable legal concepts that might translate from international law directly into regional and national legal systems is misplaced. Environmental principles are deeply malleable concepts in legal terms, including in international law terms.

While environmental principles appear in various ways in international treaties, the discourse concerning environmental principles in international law centres on principles that are primarily articulated in soft law instruments. In terms of *treaties*, there are now a number of international agreements that commit parties to applying the precautionary principle in relation to discrete environmental issues: for example, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Framework Convention on Climate Change, and the Cartagena Protocol on Biosafety.⁷ However, it is not possible to isolate a defined group of environmental principles from instruments of *binding* international law, since they are isolated in such issue-specific agreements, and even then often not explicitly framed as principles.⁸ In addition, a treaty such as the Convention on Biological Diversity represents in

⁷ Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16/9/1987, entered into force 1/1/1989) (1987) 26 ILM 1541 [6]; UN Framework Convention on Climate Change (adopted 9/5/1992, entered into force 21/3/1994) (1992) 31 ILM 851, Art 3(3); Cartagena Protocol on Biosafety (adopted 29/1/2000, entered into force 11/9/2003) (2000) 39 ILM 1027, Art 10(6) ('Cartagena Protocol'). For other treaties, see P Sands, *Principles of International Environmental Law* (2nd edn, Cambridge University Press, Cambridge 2003) 270-1.

⁸ Commitments are to 'precautionary measures', a 'precautionary approach', or a detailed formulation of the principle, as in Cartagena Protocol, Art 10(6). See D Peterson, 'Precaution: Principles and Practice in Australian Environmental and Natural Resource Management' 50 *The Australian Journal of Agricultural and Resource Economics* 469, 474.

its entirety what is an environmental principle in other instruments and legal settings – the principle of ‘conservation of biological diversity’.⁹

Environmental principles have a higher and more deliberate profile in international *soft law* instruments. These instruments began with the Stockholm Declaration on the Human Environment in 1972 and include the 1987 Brundtland Report and 1992 Rio Declaration on Environment and Development, through to the Johannesburg Declaration on Sustainable Development in 2002.¹⁰ All these instruments contain commitments by signatory states to implement agreed environmental ‘principles’, which, from the Brundtland Report onwards, are particularly focused on the achievement of ‘sustainable development’. The environmental principles in the Rio Declaration (‘Rio principles’) have the highest profile in environmental law – they represent a watershed moment for the (ongoing) international sustainable development agenda, in terms of its ambition and the extent of international consensus. These soft law declarations and reports also included *judicial* initiatives to collaborate internationally in the development and implementation of legal regimes designed to achieve sustainable development.¹¹ The latter agreements, in particular the Rio and Johannesburg Declarations, represented failures to agree formal treaties with

⁹ Convention on Biological Diversity (adopted 5/6/1992, entered into force 29/12/1993) (1992) 31 ILM 818. Cf World Commission on Environment and Development, ‘Report of the World Commission on Environment and Development: Our Common Future’ (20 March 1987) UN Doc A/42/427 (‘Brundtland Report’) Annexe 1, Principle 3; *Protection of the Environment Administration Act 1991* (NSW) (‘POEA Act’), s6(2)(c).

¹⁰ United Nations Environment Programme, ‘Declaration of the United Nations Conference on the Human Environment’, (16 June 1972) UN Doc A/CONF.48/14, 11 ILM 1461 (1972) (‘Stockholm Declaration’); Brundtland Report (n8); United Nations Conference on Environment and Development, ‘Rio Declaration on Environment and Development’ (14 June 1992) UN Doc A/CONF.151/26 (Vol. I), 31 ILM 874 (1992) (‘Rio Declaration’); World Summit on Sustainable Development, ‘Johannesburg Declaration on Sustainable Development’ (4 September 2002) UN Doc A/CONF.199/20 (‘Johannesburg Declaration’). Other soft law instruments are discussed in Preston, ‘Role of the Judiciary in Promoting Sustainable Development’ (n5) 18-21.

¹¹ In particular, UNEP, ‘Johannesburg Principles on the Role of Law and Sustainable Development’, Global Judges Symposium, Johannesburg, South Africa, 18-20 August 2002 (‘Johannesburg Principles’).

binding legal commitments to sustainable development in international law terms.¹² One result of this failure has been the Earth Charter, agreed between thousands of civil society groups between 1992 and 2000¹³ – this has no legal status in international law, particularly as it is not an agreement between nation states, but it was eventually launched at a UN-sponsored forum.¹⁴ This agreement is a bold and wide-ranging document, and it sets out further aspirational ‘interdependent’ principles for a sustainable way of life.¹⁵ These principles include versions of environmental principles in the soft law instruments above, but also a range of other principles dealing with global economic and social challenges, and they represent the frustration of civil society groups and NGOs that international institutions and states have been unable to agree a binding and radical agenda of sustainability. Another consequence of the non-binding legal status of the Rio Declaration was its subsequent endorsement by UN General Assembly resolutions,¹⁶ including Resolution 48/190 which urges all governments to promote widespread dissemination of the Declaration and requires UN organs and bodies to incorporate the Rio principles into their programs and processes.¹⁷ Thus there is some derivative binding legal effect of the Rio principles in international law.

In addition to these UN-sponsored agreements, the Organisation for Economic Co-operation and Development (‘OECD’) has also developed recommendations of principles for

¹² The Brundtland Report had called for a charter to ‘prescribe new norms for... state behaviour to maintain livelihoods and life on a shared planet’: Brundtland Report (n8), 332. See K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot 2008) 34-38.

¹³ Ibid 35-37.

¹⁴ Earth Charter Commission, ‘Earth Charter’, The Hague, Netherlands, 2000 (‘Earth Charter’).

¹⁵ Ibid.

¹⁶ UNGA Resolution, ‘Report of the United Nations Conference on Environment and Development’, UN Doc A/RES/47/190 (endorsing the Rio Declaration and accompanying documents).

¹⁷ UNGA Resolution, ‘Dissemination of the principles of the Rio Declaration on Environment and Development’, UN Doc A/RES/48/190.

international environmental policy.¹⁸ In particular, the OECD is considered to have developed the polluter pays principle.¹⁹ The separate international derivation for this principle reinforces the plurality of international environmental principles, although all were formulated as policy objectives relating to the environment and sustainable development.

While these international instruments are predominately ‘soft law’ in an international law sense,²⁰ and contain a wide range of policy ideas and agendas, they have two characteristics that make them oft-cited sources of environmental principles in environmental law. First, quite simply, they set out *lists of principles* that represent the common conviction of the signatory states to implement sustainable development globally²¹ – ‘principles’ are employed as thematic shorthand to represent and guide policy on environmental management and sustainable development.²² In the case of Annexe 1 to the Brundtland Report, such listed principles for environmental protection and sustainable development are explicitly articulated as being ‘legal principles’. This legalising trend was confirmed by the efforts of the International Law Association, leading up to the Johannesburg Summit, to identify the

¹⁸ 1972 Council Recommendation on Guiding Principles concerning International Aspects of Environmental Policies, OECD, C(72) 128 final.

¹⁹ Ibid; 1974 Council Recommendation on the Implementation of the Polluter Pays Principle, OECD, C(74) 223 final.

²⁰ C Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 Int’l & Comp LQ 850; G Palmer, ‘New Ways to Make International Environmental Law’ (1992) 86(2) The American Journal of International Law 259, 269-270.

²¹ Or, subsequent to the Rio Declaration, a commitment to the previous Rio principles: Johannesburg Declaration (n9); Johannesburg Principles (n10). The Johannesburg Declaration also manifests its commitment to the Rio principles through a detailed plan for their implementation: WSSD, ‘Plan of Implementation of the World Summit on Sustainable Development’ (4 September 2002) UN Doc A/CONF.199/20. Cf Earth Charter (n13), which does not represent an agreement between states, but indicates the prevalence of ‘principles’ in international policy discussion on environmental matters.

²² Often for reasons of political pragmatism: Chapter 2(B)(2).

key legal principles relevant to sustainable development, established by and since the Rio Declaration.²³

The second characteristic of these international instruments that makes them attractive sources of principles in environmental law is the *international consensus* they represent. Although these are soft law instruments that do not (yet) slot into orthodox paths for applying international law within national legal systems,²⁴ they represent a commitment by a large part of the international community to achieve agreed goals expressed in the form of principles.²⁵ This suggests that these principles have a universal meaning and impact, and that they are to be followed and applied internationally.²⁶ Accordingly, scholars and some judges assume that such principles do, or should, ‘trickle’ or ‘cascade’ down from the international sphere to action, including legal developments, within regional, national and

²³ Chapter 2, n157.

²⁴ Eg in Australian law, see G Bates, *Environmental Law in Australia* (6th edn, Butterworths, Sydney 2006) 121.

²⁵ Palmer, ‘New Ways’ (n19) 266-269; F Maes, ‘Environmental Law Principles, Their Nature and the Law of the Sea: A Challenge for Legislators’ in M Sheridan and L Lavrysen (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002) 73. National and regional governments agree: Ecologically Sustainable Development Steering Committee ‘National Strategy for Ecologically Sustainable Development’ (Australian Government Publication Services, 1992) (‘NSED’) 15; Council of the European Union, Brussels European Council 16/17 June 2005, Presidency Conclusions, 10255/1/05 Rev 1, 2.

²⁶ D Bodansky, ‘Customary (and Not So Customary) International Environmental Law’ (1995) 3 Ind J Global Legal Stud 105.

local spheres.²⁷ This position is encouraged by the UN Resolution 48/90.²⁸ In this way, Silveira asserts that the Rio Declaration and its accompanying *Agenda 21*²⁹ are:³⁰

... [the] fundamental legal instruments for sustainable development... that attempt to address the *full range* of legal principles and political objectives, *at international, regional, and national levels* to reach sustainable development.

Similarly, Cameron et al review the implementation of a selection of environmental principles that have ‘emerged in the main text of international conventions’, looking at legal and policy developments in a range of jurisdictions.³¹ Drawing on international soft law instruments as a starting point is thus how many legal scholars approach analysis of environmental principles. Boer explains this in terms of the ‘globalisation’ and ‘internationalisation’ of environmental law, with common approaches and principles developed and transferred from one international convention to the next and being absorbed into national law.³² Judicial inclination to adopt this approach is seen in the Johannesburg Principles, including a commitment to adhere to the Rio Principles through their national

²⁷ Eg M Evans, *Principles of Environmental and Heritage Law* (Prospect Media, St. Leonards 2000) Ch 5 (particularly 138-141); P Stein and S Mahony, ‘Incorporating Sustainability Principles into Legislation’ in P Leadbeter, N Gunningham and B Boer (eds) *Environmental Outlook No 3: Law and Policy* (Federation Press, Leichhardt 1999); above n5; *Bentley v BGP Properties* [2006] NSWLEC 34; (2006) 145 LGERA 234 [90]; *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256 [108]-[120], and other scholars discussed in this paragraph.

²⁸ Above n15.

²⁹ *Agenda 21* accompanied the *Rio Declaration*. While not legally binding, it is a guide to governments in implementing the decisions made at the Rio Conference up until 2000: UNCED, *Agenda 21*, UN Doc A/CONF.151/PC/100/Add.1 (1993) (*Agenda 21*).

³⁰ M Silveira, ‘International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring’ (1995) 31 *Willamette L Rev* 239 241 (emphasis added). See also A Marong, ‘From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development’ 16 *Geo Int’l Env’tl L Rev* 21 56-7.

³¹ J Cameron, P Pevato and J Abouchar, ‘International Implementation of the Principles’ (1994) Fenner Conference on the Environment - Sustainability: Principles to Practice (Department of Environment, Sport and Territories, Australian Commonwealth Government).

³² B Boer, ‘The Rise of Environmental Law in the Asian Region’ (1999) 32 *U Rich L Rev* 1503, 1508-9.

‘judicial mandates to implement, develop and enforce the law’.³³ This judicial inclination is seen in national cases which approve scholarly comments on the universal impact of environmental principles in international soft law instruments,³⁴ or where judicial reasoning in national decisions refers directly to principles in international instruments as a source of legal influence.³⁵

However, despite these (suggested) connections between environmental principles in national and regional legal systems and those in international instruments, there is no definitive group of environment principles derived from international law, which might translate directly into regional and national legal systems, and provide a universally coherent group of environmental principles for legal study. Rather, the group of identifiable international environmental law principles is legally ambiguous and inconsistent. This is unsurprising considering that these principles are the result of political compromise, and is reinforced by scholarly choices to focus analysis on some principles in these instruments – as ‘environmental principles’ – more than others.³⁶ There are four reasons why environmental principles are legally ambiguous and inconsistent in international environmental law, examined in the paragraphs that follow: they are contained in instruments of soft law and so

³³ Johannesburg Principles (n10) Principle 1.

³⁴ Eg *114957 Canada Ltee v Hudson (Town)* [2001] 2 SCR 241 [32].

³⁵ Eg *Vellore Citizens' Welfare Forum v Union of India* AIR 1996 SC 2715 [11]; *Northcompass Inc v Hornsby Shire Council* [1996] NSWLEC 213; (1996) 130 LGERA 248; *BGP Properties v Lake Macquarie CC* [2004] NSWLEC 399; (2004) 138 LGERA 237 [90]-[91].

³⁶ To confuse matters further, international environmental law scholars group ‘environmental principles’ in various ways. Thus some group established principles of international environmental law, such as the principle of co-operation and the duty not to cause transboundary damage, along with principles such as the polluter pays principle, precautionary principle and principle of preventive action. The latter not only have a more contested normative status in international law (below nn36-38), but they also represent, at least terminologically, those environmental principles discussed more generally in environmental law scholarship. See Sands, *Principles of International* (n6) 232-290; P Birnie, A Boyle and C Redgwell, *International Law & the Environment* (3rd edn, OUP, Oxford 2009) 106-204.

have uncertain normative status, they represent between them very different kinds of ideas about environmental protection, their meanings are unclear or contested, and they constitute a select group of principles out of all ‘principles’ so-called in these instruments.

First, environmental principles in international law are of ambiguous normative status in international law. This has led some scholars to suggest that they are in a state of legal evolution,³⁷ or that they represent a modern and different form of international law,³⁸ while other scholars and jurists simply disagree over whether relevant principles (particularly the precautionary principle and principle of sustainable development) constitute customary international law.³⁹

Second, environmental principles in international law represent a wide range of ideas about environmental protection and sustainability. Some principles represent economic ideas,⁴⁰ some procedural ideas,⁴¹ some involve scientific issues,⁴² and some are more

³⁷ Palmer, ‘New Ways’ (n19), 269-270; L Rodriguez-Rivera, ‘Is the Human Right to Environment Recognised Under International Law? It Depends on the Source’ 12(1) *Columbia Journal of International Environmental Law and Policy* 1, 41-44; Maes, ‘Law of the Sea’ (n24) 60-73.

³⁸ Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (n19) 866; Bodansky, ‘Customary (and Not So Customary) International Environmental Law’ (n25); V Lowe, ‘Sustainable Development and Unsustainable Arguments’ in A Boyle and D Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999); U Beyerlin, ‘Different Types of Norms in International Environmental Law: Policies, Principles and Rules’ in D Bodansky, J Brunn  e and E Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP, Oxford 2007); W Lang, ‘UN Principles and International Environmental Law’ 3 *Max Planck Yrbk UN L* 171, 157-72.

³⁹ In relation to sustainable development: *Vellore* (n34) [10]; *Gab  ikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, 90 (separate opinion of Weeramantry J); D Tladi, *Sustainable Development in International Law* (Pretoria University Press, Cape Town 2007) 112; Bosselmann, *Principle of Sustainability* (n11) 57; cf *Gab  ikovo-Nagymaros Project*, 78 (majority opinion); Marong, ‘From Rio to Johannesburg’ (n29) 48-49. In relation to the precautionary principle, see O McIntyre and T Mosedale, ‘The Precautionary Principle as a Norm of Customary International Law’ (1997) 9 JEL 221; Sands, *Principles of International Law* (n6) 279; cf Birnie, Boyle and Redgwell, *International Law* (n35) 159-162.

⁴⁰ Rio Declaration (n9) Principle 16.

⁴¹ *Ibid*, Principle 17.

⁴² *Ibid*, Principle 15.

overarching, such as sustainable development, as described above. In fact, different environmental principles reflect different approaches to environmental protection altogether (although they can overlap and apply in respect of the same problem). While the precautionary principle is concerned with risk regulation, the polluter pays and preventive principles are concerned with pollution control, and the principle of sustainable development represents quite a different approach to environmental policy again, including notions of environmental justice as well as non-environmental considerations. Such a diverse set of ideas in international instruments of environmental ‘principles’ reflects the pluralistic state of environmental law as a subject when viewed from a purposive point of view. Thus environmental principles not only fail to constitute a group of settled *legal* concepts in international law, but they vary substantially as policy ideas. Any legal roles taken on by such wildly varying concepts must be determined by the legal context in which they appear.

Third, the precise meanings of these environmental principles in international law are unclear. The principle of sustainable development particularly is the subject of much definitional confusion. The Brundtland Report’s commonly cited exposition of ‘sustainable development’ as development that ‘meets the needs of the present without compromising the ability of future generations to meet their own needs’ is indicative but not definitive of sustainable development as a concept.⁴³ While there is a general understanding that sustainable development ‘implies the acceptance of economic development, environmental protection and social development [or equity] as non-hierarchical objectives’,⁴⁴ the

⁴³ Brundtland Report (n8) 8.

⁴⁴ Marong, ‘From Rio to Johannesburg’ (n29) 31.

Brundtland formulation is ambiguous due to its multiple objectives and it is the subject of sometimes intense disagreement,⁴⁵ particularly in light of those who reject its anthropocentric focus,⁴⁶ or who are frustrated by its lack of operational clarity.⁴⁷ Some environmental law scholars go so far as to prefer the ‘principle of *sustainability*’ instead, due to its more explicitly ecological focus.⁴⁸ As Lee suggests, ‘[a] single all-embracing definition of sustainable development is probably not possible or desirable’.⁴⁹ There is at least some scholarly consensus around the fact that there is considerable definitional confusion concerning sustainable development (before even considering whether it is a ‘legal principle’).⁵⁰ Such confusion may be troubling from a policy perspective but it is legally unremarkable in the absence of a more precise legal context or framework.

This lack of definitional clarity is compounded by the fact that sustainable development is often said to be defined by *other* environmental principles. In particular, certain environmental principles – the integration principle, the principle of intergenerational equity and the principle of intra-generational equity – are suggested (variously) by

⁴⁵ M Jacobs, ‘Sustainable Development as a Contested Concept’ in A Dobson (ed) *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (OUP, Oxford 1999).

⁴⁶ A Tarlock, ‘Ideas Without Institutions: The Paradox of Sustainable Development’ 9 Ind J Global Legal Stud 35, 38; Bosselmann, *Principle of Sustainability* (n11) 29-34.

⁴⁷ Tarlock, ‘Ideas Without Institutions’ (n45); J Ruhl, ‘Sustainable Development: A Five-Dimensional Algorithm for Environmental Law’ 18 Stan Env’tl LJ 31 44; Smith, ‘Integrating Economic, Ecology, and Law’ (n5), 301-3; G Handl, ‘Sustainable Development: General Rules versus Specific Obligations’ in W Lang (ed) *Sustainable Development and International Law* (Graham & Trotman, 1995) 36.

⁴⁸ Bosselmann, *Principle of Sustainability* (n11) Chs 1-2; A Ross, ‘Modern Interpretations of Sustainable Development’ 36(1) JLS 32, 37-40.

⁴⁹ M Lee, *EU Environmental Law: Challenges, Change and Decision-making* (Modern studies in European law, Hart, Oxford 2005) 27.

⁵⁰ Smith, ‘Integrating Economic, Ecology, and Law’ (n5) 276 (more than 70 definitions for ‘sustainable development’).

commentators to be the key elements of sustainable development.⁵¹ Even then, these constitutive principles are themselves ambiguous. Thus, the integration principle is variously understood as the requirement to integrate environmental protection into the development process;⁵² or the requirement to integrate environmental protection, economic development and social equity into international policymaking (opening up various possible ways for doing this);⁵³ or as a ‘methodological instrument that enables decision-makers to make a transition from a sector-based (environment versus development; trade versus environment), to a more holistic approach in development planning’;⁵⁴ or as the necessity to integrate the principle of intergenerational equity and the acceptance of limits on exploitation and consumption into individual as well as public choices.⁵⁵

Similar abstract definitional debates are had about other environmental principles in international law, in particular the precautionary principle, which is notoriously difficult to define. Fisher paraphrases what she finds to be the most common version of the precautionary principle:⁵⁶

[W]here there is a threat to human health or environmental protection a lack of full scientific certainty should not be used as a reason to postpone measures that would prevent or minimise such a threat.

⁵¹ Boer, ‘Institutionalising Ecologically Sustainable Development’ (n5) 318 (the integration principle is the bedrock of sustainable development); Smith, ‘Integrating Economic, Ecology, and Law’ (n5) 274-7 (intergenerational equity as central to sustainable development); Marong, ‘From Rio to Johannesburg’ (n29) 61-62 (both intergenerational equity and intra-generational equity are core principles that give substance to sustainable development). On the latter view, see E Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers, Tokyo 1989) 201.

⁵² Brundtland Report (n8) Annexe 1, Principle 7; Rio Declaration (n9) Principle 4. And vice versa: Sands, *Principles of International* (n6) 253.

⁵³ Ruhl, ‘Five-Dimensional Algorithm’ (n46).

⁵⁴ Marong, ‘From Rio to Johannesburg’ (n71) 62-3.

⁵⁵ Tarlock, ‘Ideas Without Institutions’ (n45).

⁵⁶ E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007) 40.

However, that the principle is ‘deeply ambivalent and apparently infinitely malleable’,⁵⁷ so that an ‘authoritative and generally accepted definition is nowhere to be found’.⁵⁸ This is for many reasons, including the difficult issues of scientific uncertainty and knowledge it raises⁵⁹ and the contentious policy contexts in which it is debated and applied.⁶⁰ Many critics of the precautionary principle focus on an extreme version of the principle which requires action.⁶¹ Definitional confusion further derives from its differing formulations in various international treaties and instruments.⁶² This ambiguity highlights again that any ‘legal’ definition of the precautionary principle depends on the legal contexts and cultures in which it plays a role.⁶³ Other environmental principles in international law suffer similar definitional uncertainty due to their general formulation.⁶⁴

⁵⁷ J Scott and E Vos, ‘The Juridification of Uncertainty: Observations on the Ambivalence of the Precautionary Principle within the EU and the WTO’ in C Joerges and R Dehousse (eds) *Good Governance in Europe's Integrated Market* (OUP, 2002) 253.

⁵⁸ G Majone, ‘What Price Safety? The Precautionary Principle and its Policy Implications’ (2002) 40(1) *Journal of Common Market Studies* 89, 93; M Feintuck, ‘Precaution Maybe, but What’s the Principle? The Precautionary Principle, the Regulation of Risk, and the Public Domain’ 32(3) *JLS* 371; Peterson, ‘Precaution’, 470-478.

⁵⁹ Chapter 2, n104.

⁶⁰ Eg T Christoforou, ‘Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty’ [2000] *NYU Env'tl LJ* 622; Majone, ‘What Price Safety?’ (n57); R Lyster and E Coonan, ‘The Precautionary Principle: A Thrill Ride on the Roller Coaster of Energy and Climate Law’ (2009) 18(1) *RECIEL* 38.

⁶¹ Eg C Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, Cambridge 2005) 4.

⁶² Preston, ‘Role of the Judiciary in Promoting Sustainable Development’ (n5) 133-136.

⁶³ E Fisher, ‘Precaution, Precaution Everywhere: Developing a “Common Understanding” of the Precautionary Principle in the European Community’ (2002) 9(1) *Maastricht Journal of European and Comparative Law* 7, 18-20.

⁶⁴ Eg the principle of intergenerational equity – that each generation must use and develop its natural and cultural heritage so that it can be passed on to future generations in no worse a condition – has a ‘conceptual elegance’ that is ‘deceptive’: (Birnie, Boyle and Redgwell, *International Law* (n35) 122); the polluter pays principle even goes by a range of names (M Humphreys, ‘The Polluter Pays Principle in Transport Policy’ 26(5) *ELR* 451, n3).

The fourth reason why environmental principles in international law form an inconsistent grouping is that legal discourse concerning environmental principles has developed around some of these principles more than others. The central ‘environmental principles’ in environmental law scholarship constitute a seemingly arbitrary selection of those principles listed in international soft law instruments. On the one hand, some Rio Principles, such as the participation of women and role of peace and poverty alleviation in achieving sustainable development, have not translated into principles with legal currency,⁶⁵ and other principles, such as environmental impact assessment and rights of participation in environmental matters, or to a healthy environment,⁶⁶ match up with significant bodies of environmental law,⁶⁷ just not as ‘environmental principles’.⁶⁸ On the other hand, other principles in international instruments have a high profile in environmental law scholarship as ‘environmental principles’. For example, the principle of intergenerational equity, which

⁶⁵ Rio Declaration (n9) Principles 5, 20, 25. According to Boon, some Rio principles are too insubstantial in their content to be legal concepts: F Boon, ‘The Rio Declaration and its Influence on International Environmental Law’ [1992] Singapore Journal of Legal Studies 347 349.

⁶⁶ Rio Declaration (n9) Principles 1, 10, 17.

⁶⁷ On environmental impact assessment, see eg J Holder, *Environmental Assessment: The Regulation of Decision Making* (OUP, Oxford 2004). On rights of environmental participation, see Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25th June 1998, entered into force 30 October 2001) (1999) 38 ILM 517; and eg N de Sadeleer, G Roller and M Dross (eds), *Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal* (Avosetta Series Europa Law Publishing 2005). On the right to a healthy environment, see eg Rodriguez-Rivera, ‘Human Right to Environment’ (n36).

⁶⁸ This may be explained by dividing these environmental principles along substantive and procedural lines. Examples of substantive principles would be the precautionary principle and polluter pays principle; examples of procedural principles would be the principle of environmental impact assessment and participation in environmental decision-making. See Gilhuis, ‘Consequences of Introducing Environmental Law Principles’ (n5) 47; cf Boon, ‘Rio Declaration’ (n64).

can be tracked from the Stockholm Declaration through the Brundtland Report and the Rio Declaration,⁶⁹ and the precautionary principle, which first appeared in the Rio Declaration.⁷⁰

In addition, sustainable development has a high profile – it has been refined and reinforced through its negotiated iterations since the Brundtland Report, and it exists as an overarching *goal* to which other principles are directed.⁷¹ Its nomination as a ‘principle’ occurs as a scholarly and judicial response to its significance at this international level,⁷² as well as developments in EU law, rather than being nominated as a principle in any international instrument.⁷³ There are in fact a variety of scholarly approaches to sustainable development in environmental law, casting it variously as a principle or as a concept constituted by other environmental principles,⁷⁴ which all link to this extensive international profile.

In summary, environmental principles in public international law are prominent and evolving, but far from clearly identifiable and grouped as a set of legal principles. They do not (presently) constitute fundamental concepts for environmental law universally. Further, there is no extensive body of case law that elaborates the legal roles of environmental

⁶⁹ Stockholm Declaration (n9) Principle 2; Brundtland Report (n8), Annexe 1, Principle I.2; Rio Declaration (n9) Principle 3.

⁷⁰ Rio Declaration (n9) Principle 15.

⁷¹ Brundtland Report (n8), Chapter 2; Rio Declaration (n9) Principles 1, 3, 5, 7-9, 12, 20-22, 24, 27, and generally; Johannesburg Declaration (n9) [1] and generally.

⁷² Eg *Gabcikovo-Nagymaros Project* (n38), 90; Smith, ‘Integrating Economic, Ecology, and Law’ (n5) 263; Marong, ‘From Rio to Johannesburg’ 45-50; cf J Verschuuren, ‘Sustainable Development and the Nature of Environmental Legal Principles’ (2006) 9(1) (Potchefstroom Electronic Law Journal) <<http://www.saflii.org/za/journals/PER/2006/6.html>> accessed: 14 September 2010 209; Bosselmann, *Principle of Sustainability* (n11), 5.

⁷³ Sands, *Principles of International* (n6) 252; below n113.

⁷⁴ For the former position, see eg Smith, ‘Integrating Economic, Ecology, and Law’ (n5) 263, and below (nn109-113). For the latter, see eg Verschuuren, ‘Sustainable Development’ (n71); Marong, ‘From Rio to Johannesburg’ (n71) 56-64.

principles in international law.⁷⁵ However, there do exist such bodies of judicial reasoning concerning environmental principles in EU and NSW law, providing the opportunity to map legal developments involving environmental principles in these jurisdictions. As the following two Sections make clear, these bodies of case law reflect the legal development of environmental principles *different* from those examined in this Section. In both EU and NSW law, the evolution of environmental principles as legal concepts has been incremental and multi-faceted, but the histories of environmental principles are utterly different in each jurisdiction, as are the groups of environmental principles to which these histories relate. Each jurisdiction tells a different story about environmental principles.

This variance demonstrates that the identifiable groups of environmental principles with legal relevance in these jurisdictions are contingent on factors peculiar to these jurisdictions: their legal frameworks, institutional capabilities and political priorities. The legal (and political) cultures of EU and NSW law thus shape the groups of environmental principles that have emerged, and are emerging, in these jurisdictions. The only way to analyse these environmental principles as legal concepts in environmental law is to do so with an understanding of these legal cultures, as argued in Chapters 1 and 2. The distinctive development of environmental principles in EU and NSW law set out in the following Sections both justifies this methodology and provides the foundation for comparatively mapping the case law on environmental principles in Chapters 4 and 5, by painting pictures of the idiosyncratic legal cultures that have shaped their development.

⁷⁵ Although this is arguably developing: above n38 and accompanying text.

C ENVIRONMENTAL PRINCIPLES IN EU LAW

In EU law, environmental principles are set out in binding legislative and constitutional form in the Treaty on the Functioning of the European Union ('TFEU') and the Treaty on European Union ('TEU'),⁷⁶ and these instruments are the primary source of environmental principles in EU law. In particular, the TFEU sets out principles on which EU *policy* must be based in *law*: these comprise the *preventive principle*, the *precautionary principle*, the *polluter pays principle*, the *principle of rectification at source*, the *principle of integration* and the *principle of sustainable development*.⁷⁷ Since the introduction of each principle into the Treaty, which occurred at various stages of the Treaty's evolution and for different reasons, these six environment principles have taken on an increasingly prominent role in EU law, in EU legislative as well as formal policy measures⁷⁸ and in the case law of the

⁷⁶ Treaty on the Functioning of the European Union (Lisbon Treaty) ('TFEU'); Treaty on European Union (Lisbon Treaty) ('TEU').

⁷⁷ TFEU, Articles 11, 191(2).

⁷⁸ Eg Council & Parliament Regulation (EC) 178/2002 laying down the general principles and requirements of food law [2002] OJ L31/1, Recitals 20, 21, Arts 6(3), 7; Council & Parliament Directive (EC) 2006/12 on waste [2006] OJ L114/9, Art 15 ('Waste Directive 2006'); Council & Parliament Directive (EC) 2006/21 on the management of waste from extractive industries, Recital 32 ('Mining Waste Directive'); Council & Parliament Regulation (EC) 2006/1907 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Art 1(3); Council & Parliament Directive (EC) 2008/98 on waste and repealing certain Directives [2008] L312/3, Recital 30 ('Waste Directive 2008'), Arts 4(2), 14(1); Parliament and Council Directive (EU) 2010/75 on industrial emissions (integrated pollution prevention and control), Recitals 2 & 25 (cf former Council Directive (EC) 2008/1 concerning integrated pollution prevention and control (codified version) [2008] OJ L24/8 ('Codified IPPC Directive 2008'), Recitals 2 & 10, Annex IV); Commission of the European Communities, 'Communication from the Commission on a Partnership for Integration – A Strategy for Integrating the Environment into EU Policies', COM (98) 333 ('Communication on Environmental Integration'); Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle', COM (2000) 1 ('Communication'); European Council, 'Renewed Sustainable Development Strategy' (2006) Document 109/7/06 ('SDS').

European courts,⁷⁹ so that they now play a significant role in the ‘environmental law’ of the European Union.

The history of these principles law demonstrates that, while their development corresponded with the explosion in environmental principles in international instruments in the last few decades, their European derivation was relatively independent of international developments. Thus the preventive principle, the principle of rectification at source and the polluter pays principle were first suggested in 1972 by a German proposal to the Council devising the first European Community Environmental Action Programme (‘EAP’) – a non-binding policy document introduced before the EC had a specific Treaty basis to formulate environmental policy and legislation.⁸⁰ This coincided roughly with the Stockholm Declaration in international environmental law, but the principles in these two instruments are different, as was the motivation for developing these European principles of environmental policy. This is because the EAP fitted within a bigger picture of common trade policy in the European Community, and within a multi-level legal framework. Considering the potential tension between economic and environmental aims, and the

⁷⁹ Chapter 4.

⁸⁰ L Krämer, ‘The Genesis of EC Environmental Principles’ in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004) 31. The first EAP was adopted jointly by the EC and the Member State governments in 1973: ‘Programme of Action of the EC on the Environment’ [1973] OJ C112/1. Community EAPs were successively introduced thereafter, repeating these environmental principles, and including the precautionary principle as a basis of EU environmental policy. EAPs are now legally binding, setting the EU environmental legislative agenda: Council & Parliament Decision (EC) 2002/1600 laying down the Sixth Community Environmental Action Programme [2002] OJ L242/1, Art 2(1).

overlap with Member State environmental policies, there was motivation to agree and adopt *general* environmental priorities,⁸¹ encouraging their formulation as ‘principles’.

While the environmental agenda of the Community began to grow, primarily through legislation,⁸² these environmental principles played no explicitly significant role, until they were introduced into the then EC Treaty by the Single European Act (‘SEA’) in 1986.⁸³ That Act introduced Title VII into Part Three of the EC Treaty (now Title XX TFEU) – a chapter on environmental policy – which formalised Community environmental policy and gave Community institutions non-exclusive competence to legislate in the field. In particular, Article 130r(2.2) provided that ‘environmental protection requirements shall be a component of the Community’s other policies’. This provision was revised by the 1992 Maastricht Treaty,⁸⁴ and, while since removed from the Treaty’s environmental title, it lives on in the *integration principle* in Article 11 TFEU. This integration principle, concerned with integrating environmental protection requirements into the European Union’s internal market project and the particular range of EU competence,⁸⁵ is different from the ‘integration principle’ often cited in the international sustainable development context,⁸⁶ and it has its

⁸¹ S Tromans, ‘High Talk and Low Cunning: Putting Environmental Principles into Legal Practice’ [1995] JPEL 779, 779; Krämer, ‘Genesis of EC’ (n79) 31 (referring to the German delegation’s motivation in proposing principles).

⁸² Eg Council Directive (EC) 75/439 on waste oils [1975] OJ L194/23; Council Directive (EC) 75/442 on waste [1975] OJ L194/39; Council Directive (EC) 79/409 on the conservation of wild birds [1979] OJ L103/1.

⁸³ EC Treaty (Treaty of Rome, as amended) (‘EC Treaty’); Single European Act (1986), [1987] OJ L169/1 (‘SEA’).

⁸⁴ ‘Environmental protection requirements must be *integrated* into the definition and implementation of other Community policies’: Treaty on the European Union, Together with the Complete Text of the Treaty Establishing the European Community [1992] OJ C224/1 (‘Maastricht’).

⁸⁵ Communication on Environmental Integration, n77; N Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing, Groningen 2003).

⁸⁶ Above nn 51-54.

own definitional complexities.⁸⁷ For some scholars, the integration principle also reflects a principle of ‘good governance’ in the EU.⁸⁸ Thus not only is the grouping of environmental principles different in the EU context, but similarly named principles can represent different ideas depending on the legal framework in which they are located.

The SEA also introduced Article 130r(2) EC, the predecessor to Article 191(2), which provided that Community ‘action’ relating to the environment shall be based on the *preventive principle*, the *principle of rectification at source* and the *polluter pays principle*. As Krämer observes, not only were the principles introduced ‘without much discussion’, but there was ‘little scientific, administrative and political preparation of the ground for environmental principles’.⁸⁹ The Maastricht Treaty amended Article 130r(2), changing its wording so that it referred to Community ‘policy’ on the environment rather than Community ‘action’, and it also introduced the *precautionary principle* to Article 130r(2), after a suggestion by Belgium and, again, ‘apparently... without much discussion’.⁹⁰

This lack of discussion compounded the definitional ambiguity of these principles of environmental policy, which are undefined in these Treaties themselves (and remain undefined in subsequently revised EU Treaties). For example, the idea underlying the polluter pays principle is that polluters should pay for environmental harm that they generate. However, with no explicit definition, identifying the relevant polluter and the appropriate

⁸⁷ J Jans and H Vedder, *European Environmental Law* (3rd edn, Europa Law Publishing, Groningen 2008) 17-18.

⁸⁸ J Scott, ‘Law and Environmental Governance in the EU’ (2002) 51 Int’l & Comp LQ 996, 997.

⁸⁹ Krämer, ‘Genesis of EC’ (n79) 33.

⁹⁰ Ibid 38. The precautionary principle had been previously introduced into the EC’s Fourth EAP, to promote environmental policy that was preventive rather than reactive: A Weale, *The New Politics of Pollution* (Manchester University Press, Manchester 1992) 80.

measure of liability are matters on which the principle, expressed in general terms, gives no guidance.⁹¹ Similarly, the preventive principle, which refers to the idea of preventing environmental pollution and damage rather than trying to undo their damaging effects, is sometimes confusingly conflated with the precautionary principle in EU law,⁹² as if they represent an equivalent idea.⁹³ While both principles are generally concerned with *preventing* environmental harm, such conflation undermines any definitional clarity, including a clear scope of legal operation, for the preventive principle. The Treaty's general formulation says nothing of *how* to prevent environmental damage, or *who* should do the preventing, or *when*.⁹⁴

As for the precautionary principle, a more detailed exposition of its meaning and application in the EU context was subsequently given in 2000 by the Commission Communication on the precautionary principle,⁹⁵ which gives lengthy guidelines on how the principle should be applied by the Commission, 'when faced with taking decisions relating to the containment of risk'.⁹⁶ This policy document was an effort by the Commission to explain and legitimise its decision-making in matters of risk regulation,⁹⁷ particularly in light of a controversial international trade dispute between the United States and the European

⁹¹ N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002) 37-44.

⁹² These are distinct principles in that the preventive principle is concerned with preventing *known* causes of environmental harm, whereas the precautionary principle is concerned with *unknown* risks of such harm (ie it concerns decisions about how to regulate risk): *ibid* 91.

⁹³ Eg SDS (n77) [6]; Waste Directive 2008 (n77), Recital 30.

⁹⁴ This is not necessarily problematic from a policy perspective (suggesting as it does a direction of travel and giving discretion), but it is unhelpful if legal clarity and precision are sought.

⁹⁵ Communication (n77).

⁹⁶ *Ibid* 9.

⁹⁷ Fisher, *Risk Regulation* (n55) 224-5.

Community over the European import ban on beef treated with hormones.⁹⁸ The Communication identifies the precautionary principle as a ‘key tenet of its policy’ in the areas of the environment, human, animal and plant health,⁹⁹ and prescribes the application of the principle within a tripartite risk decision-making process that embraces risk assessment, risk management and risk communication. While the Communication purports to identify the ‘constituent parts’ of the precautionary principle,¹⁰⁰ its concern is not to *define* the principle but to set out a *decision-making process*, centred on scientific evaluation, within which political decisions based on the principle should be made. Thus maximum scientific objectivity should support precautionary decisions,¹⁰¹ so as to minimise arbitrariness and any possibility of trade protectionism in relation to decisions made in the face of uncertain risk. At the same time, it also indicates that precautionary measures may be justified where there are ‘reasonable [presumably scientifically objective] grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health *may* be inconsistent with the *chosen* level of protection’,¹⁰² indicating that EU institutions retain considerable discretion in taking risk management decisions.¹⁰³

The Communication thus provides an insight into the institutional policy process with which the precautionary principle is concerned in the EU, indicating that the principle

⁹⁸ E Scotford, ‘Mapping the Article 174(2) Case Law: A First Step to Analysing Community Environmental Law Principles’ (2008) 8 YEEL 1, text accompanying nn21-26.

⁹⁹ Communication (n77) 3.

¹⁰⁰ Ibid 13.

¹⁰¹ Ibid 15.

¹⁰² Ibid 10 (emphasis added).

¹⁰³ Such wide discretion is also suggested by the wide scope of ‘scientific’ advice that can be taken into account in providing an objective evidentiary basis for a decision on the basis of the principle: *ibid* 16.

concerns *how discretion is exercised* by EU institutions in matters of risk regulation, even if its precise direction on this matter is ambiguous.¹⁰⁴ It articulates the context in which the precautionary principle is to be understood in EU law: any *legal* role for the principle relates to this risk regulation decision-making context. This interconnection between the role of the precautionary principle in EU law and its EU policymaking role is prescribed by the Treaty itself. As set out above, Article 130r(2) *legally* mandated the application of the precautionary principle (and three other environmental principles) for the purposes of developing and applying Community *policy* on the environment. The Communication aimed to clarify that policy mandate by means of a non-binding policy document relating to the Commission's decision-making procedures. While the Communication does not, in explicit terms, set out any legal role for the precautionary principle, Chapter 4's mapping of EU case law demonstrates that the judicial treatment of the precautionary principle by the EU courts derives directly from this policy document,¹⁰⁵ reinforcing the significance of this institutional and policy context in identifying the legal culture that shapes the precautionary principle in EU law.

While the timing of the Maastricht Treaty, which introduced the precautionary principle into the EC Treaty, coincided roughly with the agreement of the Rio Declaration, which introduced a precautionary principle of its own, an earlier incarnation of a precautionary principle in German environmental policy and administrative law¹⁰⁶ is

¹⁰⁴ Majone, 'What Price Safety?' (n57) 98; Fisher, *Risk Regulation* (n55) 228.

¹⁰⁵ Chapter 4(F)(2)(b)&(e).

¹⁰⁶ de Sadeleer, *Environmental Principles* (n90) 125-130.

suggested to have influenced the introduction of the precautionary principle in EU law.¹⁰⁷ Even this early German version of the principle – *Vorsorge Prinzip* – has an ambiguous meaning, with 11 different versions identified.¹⁰⁸ In addition, Majone points out that the EU formulation of the precautionary principle, considering its elaboration in the Communication, is more permissive than that found in Principle 15 of the Rio Declaration, which qualifies precautionary action by a requirement of cost-effectiveness.¹⁰⁹ This reinforces the simultaneous and staggered development of (related but not equivalent) environmental principles in different legal systems and institutional settings, which did not simply translate from agreement on principles at the international level.¹¹⁰

Finally, the *principle of sustainable development* was introduced into the TFEU and the TEU by the amendments introduced to the predecessor Treaty of Rome, and previous Treaty on European Union, by the Treaty of Amsterdam in 1999.¹¹¹ Unlike the inclusion of previous environmental principles above, these amendments were a *direct* response to international developments concerning sustainable development, adopting the lexicon of sustainable development (and associated definitional ambiguity of the concept) and responding to the political impetus of the Brundtland Report and Rio Declaration in

¹⁰⁷ Jans and Vedder, *European Environmental Law* (n86) 37.

¹⁰⁸ E Reh binder, *Das Vorsorge Prinzip im internationalen Vergleich* (Nomos, 1991), as cited in Majone, ‘What Price Safety?’ (n57) 93.

¹⁰⁹ Ibid 94.

¹¹⁰ L Krämer, *EC Environmental Law* (6th edn, Sweet & Maxwell, London 2007) 15.

¹¹¹ Treaty of Amsterdam: Treaty of Amsterdam, amending the Treaty on the European Union, the Treaties Establishing the European Communities and Related Acts [1997] OJ C340, Art 12; now TFEU, Article 11; TEU, Recital 9, Art 3(3), Art 5(5), Art 21(2)(f). It had also been articulated and prioritised, alongside the precautionary principle and principle of preventive action, in the Preamble to the 1992 Agreement on the European Economic Area [1994] OJ L1/3.

particular.¹¹² However, there remain differences in the EU and international approaches to sustainable development, despite this relationship.¹¹³ These Treaty amendments were soon followed in 2000 by the inclusion of the principle of sustainable development in Article 37 of the Charter of Fundamental Rights of the European Union.¹¹⁴ This inclusion of sustainable development in the Treaties and Charter was remarkable in two senses. First, it articulated the concept of sustainable development as a ‘principle’, albeit not consistently,¹¹⁵ building its profile as an ‘environmental principle’.

Second, it included sustainable development both as a qualification of the integration principle and as an overarching objective of the EU, internally and in its relationship with the wider world. In the former sense, the EU integration principle is now as follows:¹¹⁶

Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular *with a view to promoting sustainable development*.

A similar version is found in Article 37 of the Charter.¹¹⁷ In the sense of being an overarching EU objective, the sustainable development principle (along with the integration

¹¹² 5th EC Environmental Action Programme, ‘Towards Sustainability’ [1993] OJ C138/5, 11-12; Lee, *EU Environmental Law* (n48) 25.

¹¹³ M Lee, ‘Sustainable Development in the EU: The Renewed Sustainable Development Strategy 2006’ 9(1) *Env LR* 41.

¹¹⁴ European Parliament, Council and Commission, ‘Charter of Fundamental Rights of the European Union’ [2000] OJ C364/1 (‘Charter’).

¹¹⁵ TEU, Recital 9 suggests that references to ‘sustainable development’ in that Treaty (in Articles 3(3), 3(5), 21(2)(f)) are manifestations of this ‘principle’; cf TFEU, Art 11 Sustainable development is repeated as a ‘principle’ in Art 37 of the Charter, and in subsequent secondary EU legislation eg Mining Waste Directive, Art 5(1); Codified IPPC Directive 2008, Recital 10; Waste Directive 2008, Art 4(2); Council & Parliament Directive (EC) 2008/50 on ambient air quality and cleaner air for Europe [2008] OJ L152/1, recital 30 (cf Article 12). Cf leading commentary on EU environmental law that distinguishes sustainable development from other EU environmental principles, describing it as an ‘objective’, albeit one which may operate similarly to other EU environmental principles: Lee, *EU Environmental Law* (n48) 26; Krämer, *EC Environmental Law* (n108) 9-12.

¹¹⁶ TFEU, Art 11 (emphasis added).

principle) is different from the four EU environmental principles that prescribe EU environmental policy in Art 191(2) TFEU in that it is a key principle governing *all* the Union's policies and activities'.¹¹⁸ It thus cuts across the range of policy areas in which the EU has competence.

This dual, cross-cutting and inconsistent identity has since manifested in a range of legal roles for sustainable development in EU case law.¹¹⁹ It also further complicates the identity (and definition) of the integration principle in EU law – while the integration principle was introduced as a distinctly European concept concerned with qualifying Community competence in terms of environmental protection, as discussed above, the principle's connection with the internationally-derived concept of sustainable development in its more recent Treaty incarnation suggests a link to the broader idea of integration associated with sustainable development in international law (although even this has a contested and inconsistent meaning).¹²⁰ However, the influence of ideas is not all one-way. The articulation of sustainable development as a 'principle' in a legal document originated in the European context,¹²¹ leading some international law scholars to highlight EU developments as the source of this so-called principle.¹²² However, even in this context, the principle label appears to be more fortuitous than legally designed.

¹¹⁷ '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': Charter, Art 37.

¹¹⁸ SDS [1].

¹¹⁹ Chapter 4(C).

¹²⁰ Above nn51-54 and accompanying text.

¹²¹ Above nn109-113.

¹²² Above n72.

The impetus for prioritising sustainable development in EU policy has continued since the Treaty of Amsterdam, keeping up with international developments, and the EU now has an explicit Sustainable Development Strategy (SDS), which has both an internal EU aspect and an external dimension, the latter first adopted in response to the Johannesburg World Summit on Sustainable Development in 2002.¹²³ The internal dimension highlights the challenging EU-specific elements of the concept of sustainable development, particularly its interaction with other EU policies, such as economic and regulatory reform.¹²⁴ One aspect of the EU's SDS is a declaration of 'Policy Guiding Principles' for sustainable development, adding a further layer of complexity to identifying European environmental principles.¹²⁵ While these principles overlap with the Treaty-based principles discussed above,¹²⁶ they do not correspond exactly, reflecting more the principles found in international soft law instruments on sustainable development.¹²⁷ These principles are set out in a policy document (the SDS), thus they do not have the legal foundation of the Treaty-based principles in EU law. However, they indicate how loosely the nomenclature of environmental principles slides between different spheres and sites of governance, and particularly how the group of *legally* relevant environmental principles might evolve over time. This latter prospect arises in EU law because formalised policy documents concerning environmental principles (as

¹²³ SDS (n77); European Commission, 'Towards a Global Partnership for Sustainable Development' COM (2002) 83 final.

¹²⁴ Commission Communication, 'Mainstreaming Sustainable Development into EU Policies: 2009 Review of the EU Sustainable Developments'; COM (2009) 400 final.

¹²⁵ SDS (n77) [6].

¹²⁶ The precautionary principle and polluter pays principle are common.

¹²⁷ Eg 'solidarity within and between generations' (defined similarly to intra- and intergenerational equity in the Rio Declaration), and the integration principle in terms of integrating economic, social and environmental considerations.

mentioned above in relation to the Communication)¹²⁸ have had a profound influence on their judicial treatment, thus generating legal implications, not to mention the influence of such a policy on the EU legislative agenda, since it is to govern all the Union's policies and activities.

Beyond this policy document and the EU Treaties, there are also further environmental principles in EU legislation and case law, which have doctrinal roles in the reasoning of the EU courts. These include the principles of proximity and self-sufficiency found in waste legislation and policy,¹²⁹ and the principle of substitution identified by the European Court of Justice as relevant in internal market law.¹³⁰ These supplementary principles do not have an extensive legal impact but they stretch the boundaries of the group of environmental principles identifiable in EU law.

This survey of EU environmental principles demonstrates two things. First, in EU law, there is a different set of environmental principles from that in international soft law instruments, which primarily have legal status by virtue of their Treaty foundations. The interconnection between these principles and those found in international instruments, when viewed in terms of their derivation and EU law foundations rather than their common nomenclature, is limited to the principles of sustainable development and the integration principle, although the latter has an explicitly different focus in EU law. This isolation of EU law environmental principles from environmental principles in international law is reflected

¹²⁸ Above n103 and accompanying text.

¹²⁹ Waste Directive 2006, Art 8, although both principles have been qualified in new Waste Directive 2008 with respect to recovery of waste: Art 16(3); Council Directive 99/31 (EC) on the landfill of waste [1999] OJ L182/1, Recital 9.

¹³⁰ Case C-473/98 *Kemikalienspektionen v Toolex Alpha* [2000] ECR I-5681 [47].

in the case law examined in Chapter 4 – the European courts generally do not appeal to international environmental law to make sense of and reason about EU environmental principles.¹³¹ Second, even this EU grouping of environmental principles is porous and potentially evolving. There are further environmental principles developing at the boundaries of EU law. Thus there needs to be a more concrete methodological criterion for subjecting environmental principles to legal scrutiny than their assumed identification as a universal group of legal concepts, thus confirming the argument made in Chapter 2 in methodological terms, and supporting an examination of how environmental principles have in fact evolved in *EU law*. In this jurisdiction, environmental principles have an independent history, they are part of a unique legal framework, and their legal roles must be understood in terms of European legal doctrines and culture.

D ENVIRONMENTAL PRINCIPLES IN NSW LAW

Environmental principles, or ‘principles of ecologically sustainable development’ (‘ESD principles’) as they are described in Australian policy and law, are another legal beast altogether. They appear as a relatively consistent albeit not closed grouping in NSW law, which is distinct again from those groups of environmental principles identifiable in international law and EU law. This legal setting for environmental principles involves a body of domestic law,¹³² as opposed to the regional jurisdiction of EU law examined above.

¹³¹ Except in relation to the principle of sustainable development: Chapter 4(C).

¹³² New South Wales exists as a discrete legal jurisdiction (with its own courts and legislature), but also forms part of the wider national (domestic) jurisdiction in Australia, so that national ‘Commonwealth’ legislation applies in NSW, appellate judicial decisions in NSW can be finally appealed to the High Court of Australia

ESD principles in NSW law comprise four core principles – the *precautionary principle*, the *principle of intergenerational equity*, the *principle of conservation of biological diversity*, and the *principle of internalisation of costs* (embracing within it the *polluter pays principle*). These four principles now find themselves in legislative form in NSW statutes, more recently so than the Treaty incorporation of environmental principles in EU law,¹³³ and they are found in individual environmental and planning statutes rather than in a foundational constitutional instrument. Their history in NSW policy and law is however more complex than simple statutory incorporation, as examined in this Section. There is also an *integration principle* of sorts, which while not styled as a ‘principle’ in legislative form,¹³⁴ is so articulated by the NSW LEC, reflecting a trend by the Court to reinforce and extend the list of ‘ESD principles’ that guides the Court’s reasoning,¹³⁵ while also highlighting the fluid use of the label ‘principle’ in NSW law involving ESD principles. This version of the integration principle resembles that in many international instruments, referring to the need to integrate economic and environmental considerations in decision-making, with the inclusion of social considerations as well in its articulation in recent cases.¹³⁶ Thus, at the outset, the list of NSW environmental principles overlaps with those in international law and EU law, at least in terms of descriptive nomenclature, but is not equivalent in its composition.

(with leave), and there is technically a single common law within Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹³³ The first legislative formulation of ESD principles is found in *POEA Act*, s6(2).

¹³⁴ *POEA Act*, s6(2).

¹³⁵ *Bentley v BGP* (n26) [67]; *Telstra* (n26) [108]; *Bonaccorso v City of Canada Bay Council (No 2)* [2007] NSWLEC 537 [55]; *Hub Action Group Incorporated v Minister for Planning* [2008] NSWLEC 116; (2008) 161 LGERA 136 [1].

¹³⁶ *Hub* (n133) [1]; *Gerroa Environment Protection Society Inc v Minister for Planning* [2008] NSWLEC 173 (n133) [7].

In fact, environmental principles have a distinct nomenclature in NSW law generally, being referred to as principles of *ecologically sustainable development*. This difference is due to politics, in particular the political background to the Australia-wide policy process concerning sustainable development undertaken by the federal (national) government in the 1980s – the ‘ESD process’ – which first introduced ESD principles into policy and later legal jargon in Australia, as examined in sub-Section 1 below. The environmental interest groups involved in this policy process were concerned that the negotiations on developing sustainable development policy for Australia would be hijacked by non-environmental interests without there being a symbolic emphasis that environmental, or here ‘ecological’ considerations, were at its core.¹³⁷ This political influence in the evolution of environmental principles in Australian policy highlights its culturally-specific nature. In fact, the subsequent development of environmental principles in NSW law, beginning with this ESD process, has been influenced by an idiosyncratic combination of factors: by international instruments focused on sustainable development, which influenced the ESD process, but also by distinctive national features, by the constitutional challenges of environmental policymaking and regulation within Australia, and by judicial activism within the LEC.

This composite developmental path, examined in more detail in sub-Sections 1 to 3 below, has produced a group of principles that are distinct from environmental principles at both the international and EU level, due to their unique legal derivation. Despite the fact that ESD principles have a more direct international law heritage than EU environmental

¹³⁷ Green groups, fearing their interest would be diluted, threatened non-participation in the process unless this nomenclature were adopted: S Harris and D Throsby, ‘The ESD Process: Background, Implementation and Aftermath’ in C Hamilton and D Throsby (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998) 17.

principles,¹³⁸ environmental principles have (or have not) acquired formal legal recognition within each jurisdiction in different ways.¹³⁹ This is significant because it suggests different legal identities for environmental principles within these different contexts. In New South Wales law, the path to formal legal status for ESD principles has been more complicated than formation in (albeit legally ambiguous) soft law instruments in international law, or inclusion in constitutional and legislative instruments in EU law. This is due to the multiple influences on their evolution and particularly because the legal status of ESD principles in NSW law has been largely generated and developed by the innovative reasoning of the NSW LEC itself.¹⁴⁰ Thus, while ESD principles are now widespread in NSW legislation, so that there are concrete legislative instruments on which to focus legal analysis, these are not the starting point for such analysis (or for judicial reasoning) in the same way as they are in EU law.

Further, ESD principles do not correlate exactly with those environmental principles found at the international or EU level, even when they are similarly named. This can be seen in three ways.

First, terminology differs. For example, the polluter pays principle appears in NSW policy and law as but one aspect of the ESD ‘principle’ *or* ‘programme’ of ‘improved valuation, pricing and incentive mechanisms’, along with encouraging incentive structures,

¹³⁸ Through the influence of international developments on the Australian ESD process *and* the LEC’s inclination to draw on international soft law concerning sustainable development in its reasoning: below sub-Sections D(1) & (3). NSW ESD principles also have a connection to *EU* environmental principles since the LEC has cross-referred to EU case law in its developing reasoning with respect to ESD principles: eg *Telstra* (n26) [108]-[112], [116]. The LEC also refers to case law in other jurisdictions: *ibid* [134]-[135], [152]-[159].

¹³⁹ Either by way of legislative incorporation, judicial recognition, or other legal acceptance in doctrinal terms.

¹⁴⁰ Below sub-Section D(3).

such as economic instruments, to pursue environmental goals, and the pricing of goods and services based on life cycle assessments.¹⁴¹ This is a different guise for the polluter pays principle from that found in the Rio Declaration,¹⁴² or its simple formulation in the TFEU.¹⁴³ As another example, the integration principle in NSW law stands in contrast to that in EU law, due to the unique EU law competence-focused formulation of the integration principle in the latter setting.¹⁴⁴

Second, ESD principles have a degree of definitional depth, since they are given explanations in their most common NSW legislative formulation.¹⁴⁵ However such legislative explanation does not define their *legal roles* with certainty – ambiguities remain in such explanatory legislative formulations,¹⁴⁶ and legal clarity comes only through the application of these principles in legal contexts.

This leads to the third difference between similarly named principles across jurisdictions, central to this thesis, which is exposed by their varying legal roles in judicial reasoning, as examined in Chapters 4 and 5. Thus judicial cross-referral concerning the precautionary principle between LEC and EU case law belies the very different legal questions being asked in those EU decisions drawn on by the LEC. As discussed in Chapter 2, such judicial ‘borrowing’ is questionable in comparative law terms.¹⁴⁷ It involves

¹⁴¹ *POEA Act*, s6(2). This entire principle has been articulated by the LEC as an ESD principle in subsequent cases: eg *Bentley v BGP* (n26) [71].

¹⁴² Cf Rio Declaration (n9) Principle 16.

¹⁴³ Above, text accompanying n76.

¹⁴⁴ Above, text accompanying nn83-86.

¹⁴⁵ *POEA Act*, s6(2).

¹⁴⁶ Below nn177-178 and accompanying text.

¹⁴⁷ Chapter 2(C)(1)(c).

not so much equivalence of legal meaning as an attempt to establish legitimacy of reasoning with respect to environmental principles, which have no long-standing legal or doctrinal tradition in NSW law.

The distinct nomenclature of environmental principles as principles *of* ecologically sustainable development in NSW law has a further distinguishing consequence for ESD principles. Unlike EU environmental principles, there is no stand-alone ‘principle of sustainable development’ that features in NSW legal or policy contexts; rather there is the group of ‘principles of ecologically *sustainable development*’ so far identified. While the principle or objective of sustainable development in EU law and policy is itself different from other EU environmental principles in being overarching, the taxonomic difference between EU law and NSW law over this principle (or group of principles) has legal consequences, even if there is a correlative background policy objective and influence from international developments. This is particularly seen in terms of the legal reasoning adopted by the courts: in EU law, sustainable development has some form of doctrinal role that can be mapped, even if this is more ambiguous and confusing than the roles of other EU environmental principles; in NSW law, sustainable development is not mapped doctrinally but is the core idea that links all ESD principles (that themselves have doctrinal roles), which is used by the Court to identify the principles in their nomenclature as a unified group, and also to motivate their widespread application by the LEC, thus defining the institutional (‘ESD’) identity of the Court.¹⁴⁸

¹⁴⁸ Chapter 5(C).

Finally, the grouping of NSW ESD principles is not closed. Additional miscellaneous principles have been included incrementally in LEC judgments as ESD principles. These are less prominent, and include the principles of sustainable use and intra-generational equity.¹⁴⁹ These extra principles reinforce the porous grouping of environmental principles within this legal setting, as well as its distinct composition. Again, the willing recognition by the LEC of a widening group of ESD principles reflects the Court's determination to recognise such principles.

The following three sub-Sections trace the derivation of ESD principles in detail, from their inception in the Australia-wide ESD process and their significance in Australian intergovernmental environmental policymaking, to their ready adoption by the LEC in its reasoning and proliferation in NSW legislation. This lengthy and idiosyncratic interaction of developments, different from the derivation of environmental principles in EU law, reinforces how deeply embedded ESD principles are within the legal culture of NSW law and the LEC.

1 Historical Development of ESD Principles: Policymaking Tools in the National ESD Process

There were two *national* (Australia-wide) domestic factors that propelled and shaped the development of ESD principles in Australia – the political ESD process embarked on to respond to the international sustainable development agenda, and also challenges of intergovernmentalism that otherwise confront environmental policymaking and regulation in

¹⁴⁹ *Hub* (n133) [1].

Australia. By these factors, ESD principles were developed as tools of *policymaking*,¹⁵⁰ not having any formal legal status or influence. This sub-Section examines the first of these national influences that kick-started the development of ESD principles.

The ESD process was set up by the Australian Federal government in 1990 to deliver the Australian governmental response to the Brundtland Report, prior to the Rio Conference and Declaration with its articulated ‘principles’ of sustainable development and its accompanying requirement for a similar process to be established in *Agenda 21*.¹⁵¹ However, the ESD policy process was not simply a response to this international agenda – domestic politics were an ‘intrinsic part of the ESD process’.¹⁵² Then Prime Minister Hawke’s enthusiasm to respond to Brundtland and to set up the ESD process was provoked by volatile environmental issues domestically that were causing industrial trouble, business uncertainty and political divisions in the 1980s.¹⁵³

The purpose of the process was thus to figure out how to make sustainable development ‘operational’ in Australia,¹⁵⁴ and to use this opportunity to deal with national public disquiet over environmental problems. The ESD process adopted a cross-sectoral approach to the task, creating an inclusive and consultative process for addressing a policy problem that confronted a wide range of industries. Sector-specific interests and problems

¹⁵⁰ For the definition of ‘policy’: Chapter 1, text accompanying nn6-8.

¹⁵¹ Commonwealth of Australia, ‘Ecologically Sustainable Development: A Commonwealth Government Discussion Paper’ (Australian Government Publication Services, 1990). This ESD process was precisely what *Agenda 21* required – the development of a national strategy for sustainable development building upon sectoral issues and policies and wide participation (*Agenda 21*, Clause 8.7) – but it was begun well before *Agenda 21* was signed.

¹⁵² Harris and Throsby, ‘The ESD Process: Background’ (n135) 10.

¹⁵³ E Papadakis, ‘The ESD Process and Agenda 21’ in C Hamilton and D Throsby (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998) 69-7.

¹⁵⁴ Harris and Throsby, ‘The ESD Process: Background’ (n135) 16.

were represented in the process by nine Working Groups ranging from mining to fisheries to transport,¹⁵⁵ all tasked with considering sustainable development issues within their areas, and resolving conflicts between themselves to agree on sustainability initiatives. The Working Groups produced individual reports and then, after some political stalling with a change of prime minister in 1991,¹⁵⁶ a National Strategy on Ecologically Sustainable Development (NSED) was produced at the end of 1992.¹⁵⁷

‘ESD principles’ were initially introduced into the Working Group process as a means to structure the negotiations of individual Working Groups: each Working Group was, *inter alia*, to assess the compliance of its sector with ESD principles. This was the first appearance of any ‘environmental principles’ in Australian policy and they do not resemble internationally formulated environmental principles, except very loosely. The six so-called ‘ESD principles’ were: improving material and non-material wellbeing; improving equity between generations; improving equity within the present generation; maintaining ecological integrity and biodiversity; dealing cautiously with risk, uncertainty and irreversibility; and taking account of global ramifications of our actions, including on international trade.¹⁵⁸ Since the approach adopted in the ESD process was a consensus-building one that aimed to unite competing interest groups across different sectors, these ‘principles’ of ESD were tools

¹⁵⁵ The nine working groups included representatives from government, industry and environmental groups across 9 sectors – agriculture, energy use, energy production, forest use, fisheries, manufacturing, mining, tourism and transport.

¹⁵⁶ G Curran and R Hollander, ‘Changing Policy Mindsets: ESD and NCP Compared’ 9(3) *Australian Journal of Environmental Management* 158, 159.

¹⁵⁷ NSED (n24).

¹⁵⁸ Ecologically Sustainable Development Working Groups, *Final Reports* (9 volumes) (Australian Government Publication Services 1991).

for allowing different sector-specific policy issues to be addressed and consensus to be reached concerning sectoral obstacles to sustainable development.¹⁵⁹

In their final form in the NSESD, ESD principles had changed in terms of their ‘definitions’, grouping and even formulation. Thus ‘ESD’ as a policy goal was defined as ‘development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends’.¹⁶⁰ Then a set of objectives *and* principles were set out to guide the ESD strategy, with no relevant distinction between them – ‘no objective or principle should predominate over the others’¹⁶¹ – yet a semantic difference between principles and objectives was adopted. Considering two of the objectives looked like environmental ‘principles’ developed in the Working Group process – ‘to provide for equity within and between generations’ and ‘to protect biological diversity...’¹⁶² – this points to the imprecise and fortuitous use of the term ‘principle’ in this context, suggesting that principles are just one device used to clarify the ambiguous concept of sustainable development, or here ecologically sustainable development.¹⁶³ In addition, these objectives and other NSESD ‘principles’ resemble environmental principles in international environmental law,¹⁶⁴ although some are defined with different emphasis. For example, the ‘integration principle’ refers to long-term and short-term consequences and integrating

¹⁵⁹ Harris and Throsby, ‘The ESD Process: Background’ (n135) 6.

¹⁶⁰ NSESD (n24) 8.

¹⁶¹ Ibid 9.

¹⁶² Ibid 8; cf n156.

¹⁶³ Curran & Hollander point out the ‘innumerable definitions and conceptualisations of ESD’ in the literature: Curran and Hollander, ‘Changing Policy Mindsets’ (n154) 162. See also Productivity Commission ‘Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies: Report No.5’ (Ausinfo, Canberra 25 May 1999) xxii and generally.

¹⁶⁴ Eg Stockholm Declaration (n9) Principles 3, 13; Brundtland Report (n8), Annexe 1, Principles 2, 3; Rio Declaration (n9) Principle 3.

‘social’ and ‘equity’ considerations as well as economic and environmental concerns.¹⁶⁵ As in the Rio Declaration, environmental principles here also adopt economic goals including economic growth and international competitiveness, which rank alongside environmental considerations, indicating that these particular ESD principles include more than ‘environmental principles’.¹⁶⁶ These changes reflect the influence of the evolving international sustainable development agenda, including the concurrent Rio process; however the NSESD remains independent in its agenda and design.¹⁶⁷ As a result, the NSESD presents a broad and ambitious policy agenda integrating but not prioritising environmental issues, and setting out ESD principles as a loose set of directives to pursue that agenda, defined generally but providing little direction for *legal* application of these ideas.¹⁶⁸

Thus Australian ESD principles began as concepts, with a conveniently evolving international hook to promote their domestic acceptance and formulation, around which domestic policymaking and political pragmatism could be centred. However, they were unsettled and inconsistent concepts, with no legal identities.

2 Intergovernmentalism: Another Reason for National Politics to Embrace ESD Principles

The second national domestic factor that shaped the subsequent emergence of ESD principles in NSW law was the challenge of intergovernmentalism that is particular to Australia’s

¹⁶⁵ NSESD (n24) 8; cf Rio Declaration (n9) Principle 4, and above, text accompanying nn51-54 & n142.

¹⁶⁶ Eg Rio Declaration (n9) Principle 12.

¹⁶⁷ NSESD (n24) 15-16.

¹⁶⁸ Nor does it provide much direction for their translation into policy action: Curran and Hollander, ‘Changing Policy Mindsets’ (n154) 161-2.

constitutional governance arrangements, causing problems for the development of coherent environmental policy and regulation in Australia. Because of this challenge, the various layers of Australian government (federal and state in particular) were keen to engage with the international sustainable development agenda for another ulterior domestic motive: to address ‘problems of governance’ within Australia.

These governance problems are reflected in ongoing conflicts between federal and state governments over responsibility for the environment as an area of policy, which has consequences for budgetary allocation and policy coordination.¹⁶⁹ These problems are caused by the unclear jurisdictional demarcation of responsibility for environmental matters between layers of Australian government. The environment overlaps with other policy areas, and the federal government’s power to legislate with respect to environmental issues is, absent an explicit constitutional power to legislate for the environment, constrained by the need for a connection to other heads of power in the federal Constitution.¹⁷⁰ Indeed it is unlikely that a discrete power to govern in relation to environmental policy issues could be easily framed and assigned to one level of government, since environmental issues are often wide-ranging and cross over into many other areas of policy,¹⁷¹ with the result that federal and state governments in Australia find themselves sharing power to govern environmental

¹⁶⁹ Papadakis, ‘ESD Process and Agenda 21’ (n151) 70, 80.

¹⁷⁰ Australian Constitution, s 51. This is so even though the federal heads of power in s 51 (eg interstate trade, external affairs, corporations, taxation) have been construed broadly to enable the passing of legislation such as the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). A landmark case demonstrating federal-state tension over environmental jurisdiction is the Franklin Dam case: *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.

¹⁷¹ Final Report of the Australian Constitutional Commission (Australian Government Publication Services 1988) 757-767.

issues and having to cooperate.¹⁷² In light of the resultant tension in Australian federal-state governance arrangements, work began on an Intergovernmental Agreement on the Environment ('IGAE') after the Brundtland Report but *before*, and independently of, the UNCED Convention that led to the Rio Declaration.¹⁷³

By the time the IGAE was signed in 1992, however, the international sustainable development agenda (as progressed and decided at the Rio conference) was built into the Agreement, and particularly into the '*principles of environmental policy*' included in Section 3. These principles, which federal, state and local governments agreed to develop and implement in policies and programmes at all levels of government, were a select group that were inspired by the '*legal principles for environmental protection and sustainable development*' set out in Annexe 1 of the Brundtland Report and the Rio principles. The influence of these international instruments on the IGAE is seen in the similar wording used in setting out principles, but the selective grouping and discrepancies in exact wording highlight there is no literal transplantation from these international agreements.¹⁷⁴ Further, the nature of the IGAE is very different from international soft law instruments on sustainable development, as demonstrated by the remainder of the IGAE, which is focused

¹⁷² J Crawford, 'The Constitution and the Environment' (1991) 13 Syd LR 11. This reflects environmental protection being a 'shared competence' between the EU and Member States in EU law.

¹⁷³ Intergovernmental Agreement on the Environment, adopted 1 May 1992 ('IGAE'); Papadakis, 'ESD Process and Agenda 21' (n151) 70.

¹⁷⁴ Eg they include a precautionary principle resembling Rio Declaration (n9) Principle 15, but with two additional 'guidelines' as to its application; the principle of intergenerational equity reflects Brundtland Report (n8), Annexe 1, Principle 2, and Rio Declaration, Principle 3, but without the reference to intra-generational equity. Further, many principles in the Brundtland Report and Rio Declaration do not find specific expression in the IGAE.

on assigning environmental policymaking responsibilities and roles between the various layers of Australian government.

These IGAE principles of environmental policy are of particular importance in tracing the evolution of NSW ESD principles since, not only is the IGAE directly referred to in some LEC judgments in developing doctrinal roles for ESD principles,¹⁷⁵ but the IGAE forms a blueprint for ESD principles that have since been enshrined in many NSW statutes, which the LEC must interpret and address in resolving cases. That blueprint comprises the four ‘principles’ in Clause 3.5 IGAE that constitute an agreed intergovernmental basis of policy-making and program implementation to further ‘ecologically sustainable development’ (and ‘sustainable economic development’¹⁷⁶) in Australia.¹⁷⁷

3.5.1 *precautionary principle* -

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:

- i. careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- ii. an assessment of the risk-weighted consequences of various options.

3.5.2 *intergenerational equity* -

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 *conservation of biological diversity and ecological integrity* -

¹⁷⁵ Eg *BGP* (n34) [24]; *Telstra* (n26) [113], [116]-[119].

¹⁷⁶ Clauses 3.2 and 3.3 differently stress the goal to be achieved by the principles of environmental policy set out in Section 3.

¹⁷⁷ IGAE, Clause 3.5 (emphasis added).

conservation of biological diversity and ecological integrity should be a fundamental consideration.

3.5.4 *improved valuation, pricing and incentive mechanisms* -

- environmental factors should be included in the valuation of assets and services.
- *polluter pays* i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement
- the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes
- environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems.

In addition, Clause 3.2 IGAE contains a version of the ‘integration principle’, set out in less prescriptive terms than the principles in Clause 3.5, recognising, that ‘sound environmental practices and procedures, as a basis for ecologically sustainable development,... requires the effective *integration* of economic and environmental considerations in decision-making processes’. However, its generality discounts any definitional clarity, particularly as to how it might be implemented, either in policy terms or legally. As for the four ‘environmental principles’ listed in Clause 3.5, they are given some ‘definitions’ by their explanatory paragraphs, in contrast to the articulation of environmental principles as the basis of EU environmental policy in the TFEU.¹⁷⁸

However, these definitions remain broad and ambiguous. For example, it is not clear what it means to maintain or enhance the ‘health, diversity and productivity of the

¹⁷⁸ TFEU, Article 191(2).

environment’ for the purposes of the principle of intergenerational equity, nor what precise liability standard and obligation is imputed by this version of the polluter pays principle.¹⁷⁹ For another, it contains a mixture of mandatory language and discretionary direction and qualification. In mandatory terms, the present generation ‘should ensure’ environmental health, diversity and productivity for future generations; those who pollute ‘should’ bear costs. In discretionary and qualified terms, decision-making based on the precautionary principle ‘should be guided by’ evaluation to avoid irreversible harm ‘where practicable’. Further, the detail of the mandatory language included in each principle is not necessarily to be taken literally. If done so, the precautionary principle would be restricted to cases in which decision-makers refused to take particular action because of scientific uncertainty, leaving the principle irrelevant in all decision-making cases involving scientific uncertainty but where no particular measures were refused or postponed.¹⁸⁰ In the result, these IGAE formulations of ESD principles do not prescribe a clear route for the doctrinal application of these principles by courts.

This is particularly because, unlike the loosely comparable EU Treaties from which the environmental principles in EU law derive, the IGAE itself is generally thought to have no legal effect in Australian or NSW law. Despite its formal structure as a deed of

¹⁷⁹ As a further example, ‘conservation of biological diversity and ecological integrity’ involves a number of ambiguous elements, including the elusive environmental buzzword ‘biodiversity’, and conservation of ecological integrity, which has a broad and scientifically uncertain scope, covering the ‘conservation of the earth’s life-support systems’: J Moffet and F Bregha, ‘The Role of Law in the Promotion of Sustainable Development’ (1996) 6 *Journal of Environmental Law and Practice* 3, 4-5. Further, the formulation of the precautionary principle, resembling that in international law, is affected by similar definitional ambiguity: above, text accompanying n55-62.

¹⁸⁰ *Lend Lease Development v Manly Council* [1998] NSWLEC 136; cf *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 [128]-[129].

agreement, the constitutional status of the IGAE,¹⁸¹ and its substance and language, show that the IGAE is a ‘political compact’ only, setting up a co-operative framework concerning the exercise of public power in relation to environmental matters throughout Australia.¹⁸² In terms of its substance, particularly relevant for commentators in reaching this conclusion is the fact that the IGAE is ‘replete with policy considerations’, including the ‘aspirational’ principles set out in Clause 3.5.¹⁸³ These environmental principles in the IGAE are sufficiently broad and general in their terms to be incapable of construction as legally certain agreed terms.¹⁸⁴ Thus, Talbot J, in the LEC, faced with an argument that the precautionary principle was a legal standard that he was obliged to apply, set out the legal limitations of the IGAE in the following way:¹⁸⁵

The [IGAE is] not legislation and accordingly [is] no more than an understanding between representatives of the Commonwealth, States and Territories. [It comprises] a series of policies and objectives with broad, general agreement on national strategy. [It] create[s] no binding obligation upon... this Court. [It is] heavily constrained to accommodate differing regional requirements and budgetary priorities.

The informal constitutional status of the IGAE, the policy-directing nature of the environmental principles there set out, and the breadth and generality of those principles,

¹⁸¹ While intergovernmental agreements have no legal authority under the Australian Constitution, Australia’s system of government has come to depend on hundreds of such agreements between federal and state authorities, demonstrating the ‘co-operative federalism’ that has pragmatically developed to characterise Australia’s federal governance arrangements. Ash brands this the ‘silent spread of a quasi-legislative scheme’: D Ash, ‘Free the Fourth Arm’ *Sydney Morning Herald* (Sydney 23-24 August 2008) 32.

¹⁸² C Gilbert, ‘Future Directions in Commonwealth Environmental Law’ in W Duncan (ed) *Planning and Environmental Law in Queensland* (Federation Press, Sydney 1993), 73-74; Bates, *Environmental Law* (n23), 34.

¹⁸³ A Gardner, ‘Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada’ 11(2) *Environmental and Planning Law Journal* 104, 119.

¹⁸⁴ Cf *South Australia v Commonwealth* (1962) 108 CLR 130, 141, 150.

¹⁸⁵ *Nicholls v Director-General of National Parks & Wildlife Service* (1994) 84 LGERA 397, 419. Also Pearlman J in *Greenpeace Australia v Redbank Power* [1994] NSWLEC 178; (1994) 86 LGERA 143, 153; *Planning Workshop Ltd v Pittwater Council* [1996] NSWLEC 211.

combined to generate a set of environmental principles that had no legal force or status in Australian law. It is only through subsequent state legislation and case law developments that the agreed environmental principles in the IGAE have taken on legal roles as ESD principles in the reasoning of the LEC and NSW law. This is in direct contrast to EU law, where the constitutional status of the EU Treaties, and their legal prescription of environmental principles as the basis of environmental policy, has been a sufficient, and determinative, basis for EU courts to use environmental principles doctrinally in their reasoning.¹⁸⁶

3 Historical Development of ESD Principles in NSW Law: Innovative LEC Reasoning and Legislative Proliferation

The two national influences on the emergence of ESD principles so far analysed – the ESD process and intergovernmentalism – are but part of the history of their emergence in NSW law. The remainder of that history rests in the singular judicial and legislative response at a *state* level in NSW to international and national developments concerning sustainable development. These two particular developments in NSW law have combined to mould the evolution of ESD principles in this context: innovative judicial recognition of their importance, including their international importance, and the adaptation of their reasoning accordingly; and a sizeable legislative response to the national ESD agenda which incorporated ESD principles explicitly in many NSW statutes. This more localised history reinforces the point that ESD principles are more than a naked transplantation of preformed

¹⁸⁶ Chapter 4.

international concepts, or norms from other regional or national jurisdictions, into this domestic setting.

While the widespread introduction of ESD principles into NSW environmental and planning legislation gave ESD principles a visible legal status in NSW law, it was the innovative reasoning of LEC judges that first confirmed and articulated legal roles for these principles. The Court thus employed ESD principles doctrinally – initially the precautionary principle – prior to any legislative adoption of the principles, and it continued to elaborate their legal roles even after their legislative incorporation, which was ambiguous as to its legal effect in various ways. Chapter 5’s mapping of the LEC’s ESD case law will examine this innovative reasoning in detail, but it is equally part of the legal derivation of environmental principles in NSW law. The initial emergence of ESD principles was due to a series of groundbreaking steps taken by the judges of the LEC, establishing that ESD principles were legally relevant considerations in deciding *merits appeals*. Merits appeals are a unique aspect of the LEC’s jurisdiction, by which the Court has a quasi-administrative role, deciding appeals from administrative decisions anew and conclusively on the merits. However, they are still judicial decisions, which form part of the Court’s case law and its novel environmental law doctrine, in which ESD principles have been employed to justify reasoning from an early stage, and so they fall within the mapping exercise of this thesis.¹⁸⁷

In establishing that ESD principles were legally relevant considerations in these early cases, within the decision-making frameworks of existing statutes that made no explicit

¹⁸⁷ Chapter 5(B)(2)&(3).

mention of ESD principles,¹⁸⁸ the Court employed a range of reasoning techniques, including reference to international environmental law and national ESD policy. While the Court did not *directly* imply legal obligations concerning ESD principles from international instruments and the IGAE to do this,¹⁸⁹ LEC judges drew inspiration from both. Thus, in *Northcompass Inc v Hornsby Shire Council*, Stein J¹⁹⁰ took particular account of the Rio Declaration in setting an agenda for the LEC to consider ESD principles in deciding merits appeals.

The particular appeal in *Northcompass* concerned a planning consent application for a green waste bioremediation plant under the *Environmental Planning and Assessment Act* ('EPA Act') – the central planning statute in NSW law, with which a large proportion of the Court's caseload is concerned.¹⁹¹ Amongst other things, the Act sets out a list of matters for planning consent bodies to take into account in deciding planning applications, and these did not explicitly include ESD principles,¹⁹² nor did the Act at this time make any reference to ESD otherwise. Having decided that the plant should not be approved because it failed to meet departmental guidelines on site selection for such plants, the Court went on to address the Council's argument, in defending its decision to grant development consent, that the

¹⁸⁸ Note that ESD principles *did* appear at this early stage in the *POEA Act* (above n9) as an object of the NSW Environmental Protection Authority (below n226); and in the *Environmental Planning and Assessment Regulation 1994* (NSW), which required that an Environmental Impact Statement for a particular development include reasons justifying the development having regard to ESD principles. These statutes were not at issue in these cases.

¹⁸⁹ The Court explicitly shied away from the legal problems involved in applying ESD principles as 'international law' concepts directly (eg *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270, 282) and avoided the direct legal applicability of the IGAE: above n183.

¹⁹⁰ *Northcompass* (n34).

¹⁹¹ *Environmental Planning and Assessment Act 1979* (NSW) ('EPA Act').

¹⁹² *EPA Act*, ex-section 90.

proposed plant was an ‘excellent example of ecologically sustainable development’.¹⁹³ Stein J found that the applicability of ESD principles to a case such as this under the *EPA Act*, as well as the interrelationship between these principles, had yet to be worked out by the Court, but that such exploration was unnecessary in this case given the result otherwise reached. However, by this acknowledgment, Stein J implied that this was a job for the Court to do, since there are ‘many Rio principles which are relevant to environmental decision-making, including a case such as this’.¹⁹⁴ Further they were principles that could potentially conflict since, while this proposed plant might be seen to be consistent with the principles of ‘sustainable use of resources’ and intergenerational equity, its uncertain environmental success might infringe the precautionary principle.¹⁹⁵ ‘ESD principles’ in this case meant *all* the relevant principles that could be drawn from the Rio Declaration, which included the precautionary principle, the principle of intergenerational equity, the ‘right to a healthy environment’, the principle of prevention of environmental harm, ‘environment impact assessment processes’, and ‘full public participation’.¹⁹⁶ Thus the LEC declared its intention to work out how ESD principles were to be incorporated into its reasoning processes, particularly in merits review decisions involving planning appeals.¹⁹⁷

The LEC had in fact already begun this process earlier in the 1990s, through innovative reasoning involving the *precautionary principle* in merits appeals, establishing the principle as a legally relevant consideration in decisions made under two NSW statutes:

¹⁹³ *Northcompass* (n34).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ These, of the Court’s tasks, are obvious examples of ‘environmental decision-making’.

the *EPA Act* and the *National Parks and Wildlife Act* ('NPWA').¹⁹⁸ These cases began with *Leatch v National Parks & Wildlife Service*, the landmark case that kick-started momentum for the precautionary principle having legal relevance in merits appeals.¹⁹⁹ In this case, Stein J gave a range of legal reasons to find that the precautionary principle was a relevant and legally required decision-making consideration (in cases where uncertainty existed concerning the nature or scope of environmental harm).²⁰⁰ In such cases, the 'premise' of the precautionary principle was that 'decision-makers should be cautious', with a view to preventing serious or irreversible harm to the environment.²⁰¹ His Honour found that this was a 'statement of commonsense' that decision-makers had already been applying in appropriate cases.²⁰² Thus Stein J implied that the legal relevance of the precautionary principle was pre-established: he was merely articulating existing (and now legally sanctioned) proper decision-making practice, which until then had not been spelled out. In addition, Stein J drew on two statutory provisions to support his endorsement of the precautionary principle as legally relevant: the *Land and Environment Court Act*'s requirement to take into account the 'public interest' in all LEC merits appeals,²⁰³ and the requirement of the *NPWA*, directly at issue in this case, that 'any matter considered to be

¹⁹⁸ *National Parks and Wildlife Act 1974* (NSW) ('NPWA').

¹⁹⁹ *Leatch* (n187). Note that the precautionary principle had first been used by the Court in an earlier case as a relevant factor in refusing a planning consent application, but with limited explanation of this reasoning: *Simpson v Ballina Shire Council* [1994] NSWLEC 43.

²⁰⁰ This case concerned a licence application, under the *NPWA* to 'take and kill' endangered frogs in the course of a road project, where there was inadequate scientific understanding of the potential impacts of the planned road on an endangered frog species.

²⁰¹ *Leatch* (n187) 282.

²⁰² *Ibid.*

²⁰³ *Land and Environment Court Act 1979* (NSW). Section 39(4) requires that in making a decision in a relevant 'appeal', the Court 'shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest'.

relevant’ should be taken into account. Both general statutory considerations were broad enough to include a reference to the precautionary principle by the Court’s interpretation, giving the principle an interpretive role in this case. It was with this domestic legislative support that Stein J then drew on the widespread use of the precautionary principle in international agreements, including the Rio Declaration, as well as the IGAE, to conclude that the precautionary principle applied to the decision in this case, which was to decline a fauna-removal licence application under the *NPWA*.

In two cases that followed, different LEC judges accepted the doctrinal development in *Leatch*, but qualified it in different ways. First, this was due to early judicial scepticism about how much doctrinal weight should be given to the precautionary principle, which might prove unworkable in decision-making because of its ambiguous formulation and application in conditions of uncertainty. For Talbot J, in *Nicholls v National Parks & Wildlife Service*,²⁰⁴ the precautionary principle might give rise to ‘interminable forensic argument[s]’ if taken literally and could involve nothing more than a cautious approach to environmental decision-making, in which the Court already engaged.²⁰⁵ Such an approach reflected the IGAE’s definition of the precautionary principle, involving ‘careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment [and] assessment of the risk-weighted consequences of various options’, and it was ‘axiomatic’ that the LEC adopted such an approach in environmental assessment.²⁰⁶ Thus the precautionary principle was best viewed as a ‘political aspiration’ rather than a legally

²⁰⁴ *Nicholls* (n183).

²⁰⁵ *Ibid*, 419.

²⁰⁶ *Ibid*.

binding standard.²⁰⁷ His Honour later retracted this sceptical view, finding that the doctrinal role of the precautionary principle as a legally required consideration had been firmly established in the Court's case law,²⁰⁸ but this initial prevarication demonstrates how novel and groundbreaking was the Court's initial reasoning in relation to the principle.

Second, cases following *Leatch* qualified its doctrinal use of the precautionary principle by showing that the principle might be taken into account as a 'relevant consideration' in various ways. This is seen in *Nicholls* and also in *Greenpeace Australia v Redbank Power Company*,²⁰⁹ where the principle gave rise to various approaches to fact-finding. The task of the Court in these cases was to apply the principle to different facts and determine the cases on their merits. In so doing, the Court variously found that a fauna-removal licence *should* be allowed under the NPWA, despite expert evidence that more scientific evidence was required as to the potential effects on an endangered species;²¹⁰ and that the principle was *not* a decisive factor in determining whether planning approval should be granted for a proposed power station, since there was scientific uncertainty on both sides as to the plant's potential environmental effects.²¹¹ Even on the same set of facts, the Court has acknowledged that a development consent decision based on the precautionary principle could have been resolved *either way*: 'whereas the decision reached [in the relevant merits appeal] concerning the precautionary principle was perfectly open to [the Court], a different

²⁰⁷ Ibid. Also *Alumino Australia v Minister Administering Environmental Planning and Assessment Act 1979* [1995] NSWLEC 177; (1995) 88 LGERA 388.

²⁰⁸ *Port Stephens Pearls v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [54].

²⁰⁹ *Greenpeace* (n183).

²¹⁰ *Nicholls* (n183); cf *Leatch* (n187).

²¹¹ *Greenpeace* (n183) 154.

conclusion on that issue was also realistically open'.²¹² Thus, the principle was developing an important doctrinal role in the Court's reasoning, but its application – or its meaning or 'definition' – was fact-dependent.

The development of this early case law, with its variable judicial attitudes and varying approaches to fact-finding (including evaluation of expert evidence), looks quite ad hoc. However, it also demonstrates the innovation and independent inclination of the Court to build doctrinal jurisprudence in relation to the precautionary principle in deciding merits appeals. As will be seen in Chapter 5, this innovative reasoning evolved to build entrenched patterns of doctrinal reasoning across the Court's case law, whereby ESD principles are adduced as legally relevant considerations, even while the application of these principles involves varying approaches to fact-finding and varying facts.

This innovative LEC reasoning was soon matched by a spate of legislative innovation incorporating ESD principles into NSW statutes.²¹³ In the late 1990s and early 2000s, ESD principles were included in widespread NSW legislation, primarily in the 'objects' clauses of Acts relating to environmental protection and planning²¹⁴ – provisions at the beginning of statutes that set out the relevant purpose of an Act.²¹⁵ Until that point, their only legislative

²¹² *Miltonbrook v Kiama Municipal Council* [1998] NSWLEC 281.

²¹³ This legislative development was partly in response to scholarly and extra-judicial calls for legislative incorporation of ESD principles: eg R Harding (ed), 'Sustainability: Principles to Practice' (Fenner Conference on the Environment 1994) 6, 8; P Stein, 'Turning Soft Law into Hard - An Australian Experience with ESD Principles in Practice' (1997) 3(2) *The Judicial Review* 91, 95. Cf Evans, *Principles of Environmental* 179 ('sustainability principles' had manifested earlier *implicitly* in NSW environmental and planning legislation).

²¹⁴ They were also included in some substantive legislative provisions, eg *EPA Act*, s112E.

²¹⁵ There are now 39 NSW statutes that explicitly aim to implement ESD or ESD principles through their provisions: J Peel, 'Ecologically Sustainable Development: More Than Mere Lip Service?' (2008) 12(1) *Australasian Journal of Natural Resources Law and Policy* 1, Appendix 1. This trend for legislative

appearances in planning legislation had been in Regulations under the *EPA Act*,²¹⁶ or in statutory ‘environmental planning instruments’ (‘EPIs’), which the Act incorporated as relevant matters required for consideration in planning decisions.²¹⁷ They had also appeared in the early 1990s in pollution control legislation.²¹⁸ This widespread statutory incorporation gave ESD principles an explicit role in NSW law, and legal authority for the LEC in its evolving doctrinal reasoning involving ESD principles.

A turning point for the legislative inclusion of ESD principles was the insertion of the object ‘to encourage ecologically sustainable development’ into the list of objects in section 5(a)(vii) of the *EPA Act* in 1998.²¹⁹ This not only confirmed the approach of LEC reasoning in planning appeals under the Act in incorporating ESD principles as relevant considerations, but also reflected the centrality of ESD in NSW environmental and planning law, and in LEC reasoning, considering the fundamental importance of *EPA Act* in that regime and to the Court’s jurisdiction.²²⁰ However, this statutory amendment included no definition of ‘ecologically sustainable development’, leaving its purposive direction vague. Combined with the varying expositions of ESD principles set out in various EPIs that the LEC was required to consider in deciding *EPA Act* merits appeals,²²¹ this built legislative

incorporation of ESD principles is not confined to NSW; it has been Australia-wide, reflecting the federal and state response to the ESD agenda to which they committed in the IGAE.

²¹⁶ Above n186.

²¹⁷ *EPA Act*, ex-s 90(1)(a)(i) (now s79C(1)(a)(i)). Eg Wagga Wagga Rural Local Environmental Plan 1991, cl 2(i) (considered in *Brunsdon v Wagga Wagga CC* [2003] NSWLEC 168 [4]-[5], [95-96], [111], [115]); Randwick Local Environmental Plan 1998 (considered in *Commonwealth of Australia v Randwick CC* [2001] NSWLEC 79 [29]).

²¹⁸ Below n223.

²¹⁹ *Environmental Planning and Assessment Amendment Act 1997*.

²²⁰ Chapter 5, text accompanying n62.

²²¹ Above n215.

impetus for the consideration of ESD and ESD principles in planning decisions, but also a confusing and incomplete picture as to the meaning of these concepts.²²²

Two developments filled in this picture. Firstly, the LEC engaged in innovative reasoning to fill in the gaps. Thus in *BGP Properties v Lake Macquarie City Council*²²³ – another landmark decision of the LEC in relation to ESD principles – McClellan CJ confirmed and expanded on the legal relevance of ESD principles in planning consent decisions under the Act. His Honour engaged in innovative statutory construction, seeking to understand Parliament’s intention when it included ‘ecologically sustainable development’ in the Act’s objects, to embed the doctrinal roles of ESD principles in a wide range of LEC cases.²²⁴ Secondly, there followed a rationalisation of NSW environmental and planning legislation not simply to adopt ESD as a common object, but to define ESD in terms of commonly elaborated *ESD principles*. This began with the 1999 amendment to section 6(2) of the *Protection of the Environment Administration Act 1991* (*POEA Act*),²²⁵ which updated the statutory ‘ESD’ object of the Environmental Protection Authority established by the Act by elaborating its definition in terms of ‘ESD principles’.²²⁶ It did this by explicitly adopting the group of ESD principles in Clauses 3.2 and 3.5 IGAE (with emphasis identifying ESD principles):

²²² Eg both the ‘concept’ of ESD and ‘ESD principles’ were mentioned these legislative settings with no indication of the relationship between them.

²²³ *BGP* (n34).

²²⁴ Chapter 5, text accompanying nn133-139.

²²⁵ The *POEA Act* establishes the Environment Protection Authority to administer integrated environmental protection in NSW: s4.

²²⁶ The *POEA Act* had previously introduced the need to maintain ESD as one of the objectives of the EPA in 1991, defining ESD in terms of ESD principles, but setting them out in more abbreviated terms. The *Protection of the Environment Operations Act 1997* (NSW) amended this articulation of ESD principles in s6(2) to match exactly the IGAE’s exposition of ESD, with the amendment taking effect from 1999.

[E]cologically sustainable development requires the *effective integration* of economic and environmental considerations in decision-making processes. [Integration Principle] Ecologically sustainable development can be achieved through the implementation of the *following principles and programs*:

(a) the *precautionary principle* – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

- (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
 - (ii) an assessment of the risk-weighted consequences of various options,
- (b) *inter-generational equity* – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
- (c) *conservation of biological diversity and ecological integrity* – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
- (d) improved valuation, pricing and incentive mechanisms – namely, that environmental factors should be included in the valuation of assets and services, such as:

- (i) *polluter pays* – that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
- (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
- (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

Other environmental and planning legislation has since defined the statutory objects and requirements of ESD and ESD principles by explicit reference back to section 6(2) *POEA*

Act, or by similarly incorporating the IGAE exposition of ESD.²²⁷ While the *EPA Act* itself was not amended to define its ESD object by reference to the *POEA Act*'s description of ESD until 2005,²²⁸ the consolidation of statutory ESD references in this way had occurred earlier in other important NSW environmental and planning statutes.²²⁹

The result of this legislative proliferation and consolidation was thus to give ESD principles a legal footing in NSW law through statutory incorporation, and some definitional elaboration. However, the section 6(2) *POEA Act* description of ESD and its constituent principles does not unambiguously define the principles or state clearly how they must be applied in judicial reasoning. This is because it inherits these problems of definitional ambiguity from the IGAE, as set out above.²³⁰ Rather, it gives some more detailed direction but leaves the principles generally stated and open to interpretation. These problems of generality and ambiguity are compounded by the provision being used to clarify the *objects* of Acts, rather than to impose decision-making obligations directly.²³¹ It suggests a legal role for ESD principles, through their legislative incorporation, but because that incorporation is overarching in relation to relevant statutes, it leaves uncertainty as to how

²²⁷ Eg *Local Government Act 1993* (NSW), ss3, 7(e), as amended by the *Local Government Amendment (Ecologically Sustainable Development) Act 1997* (NSW) (effective 1999); *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2, s6.

²²⁸ *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW).

²²⁹ Eg *NPWA*, s2A(2) was introduced to provide that (all) the Act's objects 'are to be achieved by applying the principles of ecologically sustainable development', with the principles defined by reference to section 6(2) *POEA Act*; *National Parks and Wildlife Amendment Act 2001* (NSW), s5. Also by this time, an object of the *Threatened Species Conservation Act 1995* (NSW) ('*TSC Act*') was the promotion of ESD, defined by reference to the *POEA Act*, ss 3(a) and 4.

²³⁰ Above nn177-178, and accompanying text.

²³¹ P Stein, 'Are Decision-Makers Too Cautious with the Precautionary Principle?' (2000) 17(6) *Environmental and Planning Law Journal* 3, 3.

the principles might constrain decision-making under those statutes or otherwise influence legislative obligations. Some statutes do include ESD principles explicitly as mandatory matters for consideration in decision-making,²³² but even then ambiguities and generalities in the IGAE ‘definitions’ of the principles remain.

Thus this phase of legislative rationalisation in relation to ESD is important because it acknowledged ESD principles as common concepts in NSW law and gave underlying ideas as to their meaning, but not because it defined them exhaustively or prescribed their legal application with precision. Consequently, ESD principles have traction for explicit legal treatment and analysis in the LEC context, but no defined legal role. This provided an opportunity for the LEC to respond to, and build on, these statutory developments, thereby developing its evolving ESD reasoning. As Stein J put it, the Court had an opportunity, and in his view an obligation, ‘to turn soft law [as he saw the ESD principles, deriving from international environmental law and the IGAE] into hard law’ and to flesh out the ESD concept, thus providing a ‘lead for the common law world’.²³³

The derivation of ESD principles in NSW law has demonstrated that, although ESD principles are related to environmental principles in international sustainable development instruments, they are not universal legal concepts simply transplanted into the Australian and NSW context. Rather, they began as (and remain) tools of policymaking in pursuit of *both* domestic and international agendas, and their subsequent recognition in LEC decisions and NSW legislation was both interdependent and distinctly innovative. ESD principles are sui

²³² Eg *TSC Act*, s97; *EPA Act*, s112E; *Local Government Act 1993* (n225) s89.

²³³ Stein, ‘Are Decision-Makers Too Cautious’ (n229) 3.

generis concepts in the NSW legal context, in a state of independent evolution, and they have an identity that is unique to NSW policy and law. It is in such terms, and within this legal culture, that the judicial treatment of ESD principles by the LEC must be analysed and mapped.

E CONCLUSION

This Chapter has examined the evolution of different groups of environmental principles within the different jurisdictions subject to doctrinal mapping in Chapters 4 and 5. These are EU and NSW law, representing different levels of government and environmental regulation, in which environmental principles have a high profile. There is some connection between the environmental principles in these two jurisdictions – their groupings are responsive and porous so that influences, particularly from the international sustainable development agenda, have an interconnecting impact on their evolution. However, this Chapter has shown that there is no universal set of environmental principles in environmental law, confirming the argument in Chapter 2 that environmental law scholars should not build a legal picture of environmental principles, and what they might do in environmental law, on the basis of such an assumption. In particular, there is no direct vertical translation of environmental principles from international soft law instruments to regional and national legal systems, nor is there any direct horizontal translation between legal systems. Such a translation is in fact

impossible considering the fundamentally different legal workings of each system, as argued by comparative law scholars.²³⁴

The variation between environmental principles in these jurisdictions goes to the heart of the legal cultures in which these different groups of environmental principles have legal roles. This can be seen particularly in the derivation of these principles – their history in each context depends on institutional forces and priorities, and the legal developments that occur and which are possible within each governance setting. In particular, the legal profile of environmental principles in EU law centres on their inclusion in successive Treaties (and secondary legislation); whereas, in NSW law, it is the reasoning of the LEC that is critical to their legal evolution. The different groupings of environmental principles in the jurisdictions examined are thus expressions of the different legal cultures in which they have evolved, and continue to evolve.

Thus the distinct groupings of environmental principles in EU law and NSW law (and, for that matter, in public international law) can only be understood legally in terms of those legal cultures. This confirms the methodological arguments set out in Chapters 1 and 2 for analysing the legal roles of environmental principles by comparatively mapping the bodies of judicial reasoning in EU and NSW law concerning environmental principles, taking into account the peculiar legal features of these jurisdictions. As demonstrated in this Chapter, such a methodology is implied by the nature and evolution of environmental principles themselves across these jurisdictions.

²³⁴ Chapter 2(C)(1)(c).

This Chapter has also demonstrated that it is impossible universally to define the content of environmental principles across jurisdictions. Whether this is because the policy ideas they encapsulate are too complex to pinpoint, because their meaning is contested, or is in the nature of their being ‘principles’, they do not have universally agreed definitions or definitive substantive content which describe or prescribe their legal identities. Nor do they contain, in their pithy phrasing, a detailed route map for achieving the goals they represent. They simply represent ideas of environmental protection and sustainability policy that are elaborated in a general way. Thus focusing on legal definition of environmental principles does not take one very far in analysing environmental principles as legal concepts.²³⁵ This is because their legal relevance can only be determined by examining their roles and application within particular legal cultures. Through such examination, marginal definitions of environmental principles in particular legal contexts might then be identified, as demonstrated by mapping environmental principles according their judicial treatment in Chapters 4 and 5, confirming that definitions are the *end points* (or analytical by-products) rather than *starting points* in legally analysing environmental principles.

In sum, this Chapter has demonstrated, through its analysis of environmental principles that have legal roles in public international law, EU and NSW law and their respective paths of legal evolution, that different environmental principles have legal roles in fundamentally different legal systems and cultures. Analysing those legal roles requires a

²³⁵ This issue of definition has been a distracting focus for scholarship on environmental principles: eg S Bell and D McGillivray, *Environmental Law* (7th edn, OUP, Oxford 2008)54-56; I Cheyne, ‘The Precautionary Principle in EC and WTO Law: Searching for a Common Understanding’ (2006) 8(4) Env LR 257; W Howarth, ‘The Interpretation of “Precaution” in the European Community Common Fisheries Policy’ (2008) 20(2) JEL 213; Ross, ‘Modern Interpretations’ (n47).

methodology that takes into account the idiosyncratic legal institutions, frameworks and doctrines of each legal culture. The mapping exercises in the following two Chapters undertake such analysis in EU and NSW law, examining bodies of case law concerning environmental principles in doctrinal terms, considering in detail the institutional nature of the courts involved and mapping their reasoning according to the legal frameworks, constraints and (emerging) doctrinal traditions of each jurisdiction.

CHAPTER 4

MAPPING ENVIRONMENTAL PRINCIPLES IN EUROPEAN UNION CASE LAW

A INTRODUCTION

This Chapter maps the case law of the Court of Justice of the European Union (‘CJEU’) – formerly the European Court of Justice (‘ECJ’) and Court of First Instance (‘CFI’)¹ – that involves EU environmental principles. By mapping the legal roles that environmental principles play in the case law, it demonstrates that these principles – as *legal* concepts – depend on the particular legal and institutional environment in which they are employed. In particular, their legal roles are intertwined with developing EU law doctrine. These legal roles are partly determined by the EU legal instruments and frameworks in which EU environmental principles are found, as set out in the previous Chapter, but they are also shaped by the institutional features of the EU courts and their evolving doctrinal reasoning as set out in this Chapter. The resulting map is an expression of environmental principles as part of EU legal culture.

¹ The Court of Justice of the European Union (‘CJEU’ or the ‘Court’) known as such since the Lisbon Treaty, comprises the Court of Justice, General Court and specialised courts: Treaty on European Union (Lisbon Treaty) (‘TEU’), Art 19. Art 19 renames and expands the EU court structure, which formerly comprised the European Court of Justice and Court of First Instance, with judicial panels set up under the latter in specific areas: EC Treaty of Rome (as amended) (‘EC Treaty’), Art 220. Since most cases discussed in this Chapter were decided prior to the Lisbon Treaty, references will primarily be to pre-Lisbon courts (‘ECJ’, or ‘CFI’). Where there is no need to distinguish between individual EU courts, whether pre- or post-Lisbon, ‘EU courts’ generally will be referred to.

The main EU environmental principles mapped in this Chapter were set out in Chapter 3 and they include six principles of EU environmental policy: the preventive principle, the precautionary principle, the polluter pays principle, the principle of rectification at source, the integration principle and the principle of sustainable development.² This mapping exercise sets out the legal roles of these principles in EU law by determining how they are used in judicial reasoning, rather than relying on what scholars might like them to do. The map thus drawn is by no means straightforward in EU law terms – it concerns a wide-ranging subject-matter, which has expanded beyond narrowly-defined ‘environmental’ matters in terms of EU competence,³ and it involves a variety of different EU legal actions, both procedurally and in relation to the legal questions involved. In terms of environmental law, the map demonstrates that environmental principles can and are performing a range of doctrinal functions in this EU legal context.

To identify these different functions, this Chapter maps the patterns of doctrinal reasoning involving environmental principles in EU cases. These patterns track the judicial techniques used in such reasoning, revealing the doctrinal picture of environmental principles in EU law in terms of ‘treatment categories’. These are categories of cases characterised by the particular technique used by the courts in employing environmental principles, or declining to use them, to justify their reasoning. There are three treatment categories that frame the map in this Chapter: policy cases (where environmental principles are relegated to the policy sphere and not used

² They also include a number of environmental principles at the fringe of this group in terms of their legal impact in EU law – the substitution principle, and the principles of proximity, self-sufficiency, substitution, and a high level of protection: discussed in this Chapter as they arise in cases.

³ Below n 12.

doctrinally), interpretive cases (where they are used as interpretive aids) or informing legal test cases (where they are used to test the boundaries and exercise of EU environmental competence). As a result of this mapping exercise, conclusions can be drawn in relation to both the narrow and broad aims of this thesis: concerning the legal roles played by environmental principles in EU law, and the roles of environmental principles in environmental law scholarship more broadly.

In the latter respect, the most significant point of the map drawn for *environmental law* is that legal roles for EU environmental principles are highly contingent on the EU law context, in that they reflect issues and questions of EU law. This supports the argument in Chapter 1 that studying novel legal concepts in environmental law must be done, in methodological terms, within their relevant legal context, as well as the argument in Chapters 2 and 3 that there is no universal legal identity for environmental principles internationally. More particularly, scholarly assumptions that environmental principles might represent solutions to environmental problems and to legal problems are negated in the EU context. Environmental principles in EU law cannot be called in aid directly as legal responses to environmental problems; they do not fit existing models of ‘legal principles’ in this legal context; they do not render EU environmental law comprehensively coherent; and they do not represent a radical new form of law. These conclusions are examined further in Section G below, once the case law has been mapped, and such reflections can be explored.

In respect of the narrow aim of this thesis – examining the roles that environmental principles play in EU law – these are demonstrated by the three identifiable treatment categories set out above. These categories are examined in turn in Sections D to F to map the case law, analysing cases falling within each category to exemplify and elaborate the respective roles played by environmental principles

(currently). This mapping exercise shows that environmental principles have an innovative influence on developing EU law doctrine, particularly in informing (and generating) legal tests applied by EU courts in reviewing the lawfulness of EU and Member State action under EU law, and in giving the courts a broad interpretive discretion in construing EU legislation and the Treaties. But it also shows that there are limits to the use of environmental principles in legal reasoning. These limits reflect the (often implicit) constitutional limits of the EU courts,⁴ which use environmental principles to justify their reasoning *only to the extent* that they are deciding questions about EU environmental competence that has *already* been exercised by EU and Member State institutions on the basis of environmental principles and which is then tested in court. Environmental principles currently have no free-standing roles in legal arguments to *compel* the exercise of discretion by EU (or Member State) institutions to pursue a particular environmental policy.

Another feature of this doctrinal map is that a single case might fit into more than one of the treatment categories, so that a single case might contain environmental principles playing more than one doctrinal role.⁵ By way of caveat, this Chapter does not set out an exhaustive map of all cases involving environmental principles in EU case law since there are over 300 ECJ and CFI judgments, Advocate-General opinions and lodged appeals involving environmental principles. Rather, it discusses representative cases to demonstrate the doctrinal map they constitute.

⁴ By ‘constitutional’ limits, role etc, this Chapter refers to the *proper* role of the Court as an EU institution in constituting – alongside the Council, Commission and Parliament – a governing body of the EU.

⁵ Eg Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105, which appears in both Sections D and E below.

Before considering the map of EU environmental principles constructed by these treatment categories, in Section C, the principle of sustainable development is considered separately. While its treatment by the EU courts appears in each of the three treatment categories, it also makes miscellaneous appearances in the case law. This is because it is an overarching concept in EU law and policy, which has connections to the international sustainable development agenda and a particularly ambiguous meaning, so that its legal formulations and other case law appearances are more variable than other EU environmental principles. This reflects the evolution of EU environmental principles set out in Chapter 3: the principle of sustainable development (and the integration principle) developed separately from the four environmental principles in Article 191(2) TFEU,⁶ at different times, and have more overarching roles in the Treaties. Even within a single legal context, environmental principles can do different things and, as between themselves, they are not of the same legal order or status. No map can (currently) neatly capture the legal story of EU environmental principles.

While the sustainable development principle is considered in a separate Section, the integration principle is not. Its legal role is often caught up with the principle of sustainable development, due to their interconnected formulation in Article 11 TFEU, and so it is addressed incidentally in Section C. But it is primarily because the integration principle has significant legal roles in EU case law that map onto the three treatment categories developed in this Chapter, albeit often in different ways, which shape and

⁶ Treaty on the Functioning of the European Union (Lisbon Treaty) ('TFEU' or the 'Treaty'). References throughout this Chapter to the 'Treaty' are either to this current Treaty, or to the predecessor EC Treaty (with articles identified by the suffix 'EC'), whichever was relevantly in force. EU legislation adopted under the EC Treaty is variously described as 'EC' or 'Community' legislation.

influence the very scope of these categories.⁷ This influence is due to the fact the integration principle is concerned with how ‘environmental protection requirements’, including those reflected in Article 191(2)’s principles of environmental policy, are integrated into other areas of EU policy.⁸ Its legal influence thus gives extra dimensions to these other environmental principles, expanding their legal roles beyond the strict domain of EU environmental policy in Title XX TFEU,⁹ widening the area of EU environmental policy itself,¹⁰ and suggesting more ambitious legal roles for environmental principles in EU law in the future.¹¹ The integration principle broadens the map of EU case law involving environmental principles. This integrating and expanding element of the integration principle in fact leads to a further caveat, or at least a terminological explanation. Throughout this Chapter, ‘EU environmental competence’ will be referred to as that area of EU-prescribed policy authority concerning environmental matters¹² within which political institutions – legislative and administrative¹³ – can lawfully act. This area of policy authority has expanded in EU law, particularly under the influence of the integration principle.

⁷ As will be seen, the precautionary principle also has a distinctive legal role in EU case law, partly due to the impact of the integration principle, and also because of the volume of case law concerning this principle.

⁸ TFEU, Arts 11 & 191(2); J Jans and H Vedder, *European Environmental Law* (3rd edn, Europa Law Publishing, Groningen 2008) 17.

⁹ Below, Section B(3).

¹⁰ Below, Section E(1).

¹¹ Below Section D(5).

¹² What are ‘environmental matters’ itself raises problems of definition, considering that environmental matters may be narrowly understood as pertaining only to non-human ecological concerns, or broadly understood to cover, eg the built environment, matters of international trade and questions of public health: S Bell and D McGillivray, *Environmental Law* (7th edn, OUP, Oxford 2008) 4-8. See Chapter 1, n62. In relation to this idea of ‘EU environmental competence’, a broad notion of the environment is adopted, so as to accommodate the wide-ranging subject-matter in relation to which environmental principles are employed in EU case law.

¹³ In the EU, such institutions comprise the Council, Commission and European Parliament (TEU, Arts 13, 14, 16, 17), hereafter the EU ‘institutions’. These political institutions also include Member State governments acting within the scope of EU law: Section F(2).

In order to draw (and then read and understand) this Chapter's doctrinal map of EU case law involving environmental principles, Section B first explores in more detail the legal culture in which environmental principles are employed in EU law. It examines the institutional identity of the EU courts, including their constitutional role, openness to developing judicial doctrine within different aspects of their jurisdiction, and their style of judicial reasoning. This legal background completes the picture of the particular 'internal' legal culture of EU law in which environmental principles have developing roles, building on the detailed picture set out in Chapter 3 of how six particular environmental principles have evolved to have prominent roles in EU Treaties, legislation and policy documents.

**B ENVIRONMENTAL PRINCIPLES IN EU LEGAL CULTURE: THE INSTITUTIONAL
IDENTITY OF THE EU COURTS AND THEIR DOCTRINAL TREATMENT OF
ENVIRONMENTAL PRINCIPLES**

The legal roles of environmental principles in EU case law are shaped by EU legal culture, and particularly by the institutional identity of the EU courts and the law they (can) apply. This Section sets out the nature of this identity and jurisdiction, examining the courts' progressive constitutional role, their reasoning style and doctrine, and considers how the body of case law involving environmental principles fits within this legal picture. This body of case law is so diverse in EU law terms that a doctrinal analysis of EU cases involving environmental principles is needed to identify patterns of judicial reasoning. However, it is only in light of understanding the nature of EU courts, the legal questions they decide and how they decide them, that a doctrinal map of the legal roles of environmental principles in EU law can be drawn, and made sense of, in the Sections that follow. Thus the treatment categories into which environmental principles

fall in EU law are not abstract doctrinal categories; they involve questions of EU law to be answered by the courts, and various EU legal tests and patterns of doctrinal reasoning developed to answer them. Further, the constitutional role of the EU courts in deciding the lawfulness of EU action – including all action in relation to environmental matters within the scope of EU law – determines the extent to which environmental principles have legal roles at all. In light of this EU law background, this Section concludes by introducing the three mapping categories of this Chapter as reflections of this EU legal culture.

1 The Constitutional Role and Progressive Nature of EU Courts

The CJEU, and its predecessors the ECJ and CFI, have a central constitutional role in EU law. This is set out in Article 19 TEU, which provides that the CJEU ‘shall ensure that in the interpretation and application of the Treaties the law is observed’. Since the EU Treaties – TEU and TFEU – constitute the European Union as a polity, with the consent of its Member States (the Treaty signatories), this role for the CJEU establishes its as a key institution in the EU’s constitutional architecture.¹⁴ The CJEU has taken on this constitutional role and developed a progressive institutional identity, reflecting the relative novelty of the EU ‘law’ which it interprets, applies and articulates. As Tridimas states, EU law is ‘not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent’.¹⁵ As ultimate arbiter of such law, the EU courts have (had) great scope for innovative and creative doctrinal reasoning,

¹⁴ Above n4.

¹⁵ T Tridimas, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006) 18.

as well as a need to define their own institutional identity in elaborating EU law.¹⁶ Much commentary has reflected on the ECJ's progressive constitutional steps in asserting the supremacy and direct effect of EU law within Member State legal orders,¹⁷ such that it has created a body of European constitutional law.¹⁸ Member States and Member State courts,¹⁹ as well as academics,²⁰ have supported the bold assertions of authority by the EU courts.

This progressiveness is possible due to the doctrinal freedom given to the EU courts to shape EU law by the EU's founding Treaties. This freedom can be seen at a broad level in Article 19 TEU above, which states simply that the CJEU is to ensure that the 'law' is observed. That law comprises the rules set out in the Treaties, and the secondary EU legislation enacted under them, but is otherwise undefined. The resulting space for doctrinal development has allowed the EU courts to develop a wide-ranging body of judicial doctrine,²¹ and thereby to use environmental principles creatively in their evolving doctrine.

¹⁶ Eg Case 6/64 *Costa v ENEL* [1964] ECR Eng Spec Ed 585; Joined Cases 98 & 230/83 *van Gend en Loos v Commission* [1984] ECR 3763; Joined Cases C-6 & 9/90 *Francovich v Italy* [1991] ECR I-5357.

¹⁷ Scholars have charged the ECJ with illegitimate activism: H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers, Boston 1986) 62; T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' 112 LQR 95; cf M Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford 1989) 390-391.

¹⁸ E Stein, "'Lawyers', Judges & the Making of a Transnational Constitution?' 75 AJIL 1, 3 *et seq*; J Weiler, 'The Transformation of Europe' 100 Yale LJ 2403.

¹⁹ N Fennelly, 'Preserving the Legal Coherence Within the New Treaty' 5 Maastricht Journal of European and Comparative Law 185, 198; M Maduro, *We the Court: the European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart, Oxford 1998) 30-34.

²⁰ J Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' 31(4) Journal of Common Market Studies 417, 431-432.

²¹ Including the transformative internal market tests laid down in Case 120/78 *Rewe Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649 and Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1994] ECR I-4165, as well as review tests developed under Art 263 TFEU: below, nn27-31.

In setting out this EU law background, this sub-Section, and those that follow, is not aiming to make grand statements about EU law and its evolution. Rather, it explains the particular doctrinal space that environmental principles can and do occupy in EU law, so as to make sense of their judicial treatment in this legal setting. The resulting picture is one of the legal roles of environmental principles in this jurisdiction, which is of primary significance for environmental law, and not a restatement of EU law.

2 The CJEU's Jurisdiction

The Treaties' openness to the development of judicial doctrine in EU law is also found in the more specific Treaty provisions that outline the CJEU's areas of jurisdiction. Firstly, this can be seen in Article 263 TFEU, which sets out one of the CJEU's primary areas of jurisdiction: actions may be brought directly against EU institutions to test the *legality* of their acts. In Article 263(2), a number of grounds are laid out for reviewing this legality, including lack of competence, and infringement of the EU Treaties or 'any rule of law relating to their application'.²² This first ground reflects the fact that the EU comprises a set of legally limited competences conferred, or attributed, by its Member States,²³ some of which are exclusive to EU institutions (such as EU competition policy),²⁴ and others, including the environment, of which are shared with Member State governments.²⁵

In applying these undefined and open grounds of review in Article 263(2), the EU courts have developed a range of tests for reviewing EU institutional acts – a body of 'EU

²² TFEU, Art 263(2).

²³ TEU, Art 5(2).

²⁴ TFEU, Art 3(1).

²⁵ TFEU, Art 4.

administrative law’ doctrine.²⁶ These tests include tests for determining whether a measure is within the scope of (a particular basis of) EU competence according to its centre of gravity, determined by its predominant aim and content;²⁷ the pervasive test of proportionality in EU law for determining whether EU action strays unlawfully beyond its legitimate Treaty objective;²⁸ and a test of *manifest* error of assessment for judging any discretionary overreach by EU institutions in matters of complex economic or social policy, or scientific fact evaluation.²⁹ These review tests also include the ‘general principles of EU law’, discussed in Chapter 2,³⁰ which the ECJ has developed in its case law as standards to review the legality of EU actions (including principles such as those of equal treatment or legitimate expectations).³¹ EU environmental principles do not constitute general principles in this sense;³² rather, as will be seen in Section F(2), they have an influential role on the doctrinal development of these various tests of review.

The doctrinal openness of the ‘law’ to be applied by the EU courts also characterises the second main area of the CJEU’s jurisdiction: preliminary references from Member State courts under Article 267 TFEU to decide questions of interpretation

²⁶ P Craig, *EU Administrative Law* (OUP, Oxford 2006). This includes EU constitutional law doctrine.

²⁷ Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867 [10].

²⁸ Now enshrined in Art 5(4) TEU.

²⁹ Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305 [311]; Craig, *EU Administrative Law* (n26) 438-462.

³⁰ Chapter 2(C)(3).

³¹ Tridimas, *General Principles* (n15).

³² They are not employed by the courts as a stand-alone tests of review for *all* EU actions, and environmental principles derive from the Treaties as statements of substantive policy, rather than being creatures of judicial doctrine: *ibid* 5; cf Craig, *EU Administrative Law* (n26) Chapter 19. In addition, general principles of EU law are also seen as distinct from, and as constraining the legal operation of, environmental principles: Case C-293/97 *R v Secretary for the Environment, ex p Standley* [1999] ECR I-2603 [52]-[53]; Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* [2009] 3 CMLR 45, Opinion of Advocate-General Kokott (23 April 2009) [32]-[33], [55]. See also Chapter 2(C). Note there is some suggestion that general principles of EU law can have variable or uncertain functions: Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* [2008] 1 CMLR 16, Opinion of Advocate-General Mazák (15 February 2007) [86].

of the Treaties and EU legislation and any element of the EU legal order more broadly,³³ as well as questions concerning the validity of EU institutional acts. Preliminary reference judgments are particularly important in EU law since they establish precedents of EU law and build uniformity.³⁴ The latter aspect of the preliminary reference jurisdiction simply provides an indirect form of legality review on the same grounds set out in Article 263(2), with equivalent doctrine applied by the EU courts in such cases. When it comes to its interpretive function, the EU courts in fact answer a range of legal questions. They may ‘interpret’ ambiguous provisions of the Treaties and EU legislation, and they may also ‘interpret’ EU law doctrines developed by the courts to constrain Member State actions when acting within the scope of EU law. In the latter interpretive sense, in particular, the EU courts *review* the lawfulness of Member State action, even though they do not *decide* on its legality in EU law on the facts.³⁵ Legal tests of ‘review’ have thus been developed by EU courts in relation to environmental action by both EU and Member States acting within the scope of EU law.³⁶ It is in this sense that the term ‘review test’ is used in this Chapter. The EU courts have had scope to develop doctrine in relation to these various review tests – which either relate to Treaty provisions that are textually open, or have been developed independently of any Treaty provision – across

³³ D Chalmers, G Davies and G Monti, *European Union Law* (2nd edn, Cambridge University Press, Cambridge 2010) 160-1.

³⁴ Joined Cases 28-30/62 *Da Costa en Schaake NV v Netherlands Inland Revenue Administration* [1962] ECR Eng Spec Ed 31.

³⁵ There is an important constitutional demarcation between interpretation and application of EU law in cases referred by Member State courts under Article 267, even if it is blurred in practice: P Craig and G de Burca, *EU Law: Text, Cases and Materials* (4th edn, OUP, Oxford 2008) 493-4.

³⁶ In relation to EU action, various review tests are set out above nn27-31. In relation to Member State action within the scope of EU law, these review tests include a general test of proportionality (similar to that applied to EU action, but with some structural differences: Tridimas, *General Principles* (n15) Ch 5, as well as more specific review tests depending on the alleged Member State infringement of EU law. In this Chapter, such review tests include the series of tests developed by the ECJ to determine whether a Member State has infringed Art 34 TFEU, and also the tests laid down in, and developed by the Court in relation to Art 114(4) and (5) TFEU.

both Article 263 and 267 actions. In both cases, as borne out particularly in the third mapping category in Section F, environmental principles have had an influential, albeit varying, doctrinal role with respect to tests of ‘review’ in EU law.

In those Article 267 cases that involve interpreting ambiguous EU provisions, the EU courts also have doctrinal latitude, particularly due to the broad teleological approach taken by the courts. The ECJ³⁷ tended to ‘examine the whole context in which a particular provision is situated, and [give] the interpretation most likely to further *what the Court considers* the provision sought to achieve’.³⁸ In deciding these kinds of interpretive questions, the ECJ thus builds doctrine around specific provisions and areas of substantive EU law, including its environmental law.

The CJEU’s third main area of jurisdiction – enforcement actions against Member States under Article 258 TFEU – also involves issues of interpretation of EU law, since the courts must interpret the EU Treaties, secondary legislation and related doctrines, in order to enforce them against allegedly delinquent Member States. This overlapping interpretive role is again seen in mapping the case law on environmental principles where similar doctrinal roles for environmental principles can occur in both Article 267 and 258 cases, rather than being identified by the procedural nature of the action brought.

This outline of the EU courts’ jurisdiction demonstrated two points. First, the EU courts have a wide platform (and need) to develop EU law doctrinally through their case law. Second, the different types of action that might be brought before the EU courts do not clearly demarcate the legal questions with which the courts are concerned. These questions overlap between the Court’s jurisdictional classes in procedural terms. The

³⁷ The ECJ (prior to the Lisbon Treaty) had sole jurisdictional responsibility for preliminary references.

³⁸ Craig and de Burca, *EU Law* (n35) 74 (emphasis added).

following sub-Section examines this classification problem further, setting out the diverse body of case law involving environmental principles and how it might be mapped in doctrinal terms according to treatment categories that are embedded in EU legal culture. The categories are fundamentally concerned with the exercise of EU environmental competence, and limited by the Court's role in policing such competence.

3 Diversity of EU Case Law Involving Environmental Principles: Reasons for Doctrinal Mapping

The EU case law involving environmental principles is diverse. It is not readily classified in terms of the types of action brought procedurally, the particular legal questions asked or the subject-matter involved; nor is it easy to map due to the inconsistency of reasoning style across the cases. These challenges indicate that close scrutiny of the reasoning techniques employed by the EU courts is required to determine the legal roles played by environmental principles.

As indicated above, there are a large number of court judgements and opinions in which environmental principles are either raised in argument or addressed by the courts in their reasoning. Unhelpfully for mapping the cases, there is often no linearity in the judicial discussion, so that, for example, the principles might be mentioned in the Opinion of an Advocate-General or in arguments put to the relevant court, but then not picked up on in the reasoning of the ECJ or CFI, or vice versa (the courts might address the principles without prompting). This reflects the fact that environmental principles follow no clearly established doctrinal model in EU law; rather, the doctrinal roles are in a state of evolution.

In mapping this body of EU case law, there are two challenges that a doctrinal approach to mapping the case law serves to overcome. First, in some cases, the EU

courts give only limited reasoning in their decisions, and it is difficult to discern the legal roles played by environmental principles when references to them are brief (whether dismissive or integral to the outcome of the case). In other cases, particularly involving the precautionary principle, very complex reasoning is delivered, by the CFI in particular. Detailed reasoning gives more clues about the legal role, if any, played by the precautionary principle, but its helpfulness is limited since it often involves overlapping threads of reasoning and is inconsistent in detail from case to case. A doctrinal focus minimises these difficulties by identifying the patterns of judicial treatment across the case law, and organising the cases according to these patterns (treatment categories).

The second challenge faced in mapping the case law is that the cases follow no simple patterns. As already indicated,³⁹ the relevant body of case law is a miscellany of cases that involve different types of actions, different subject-matter, and different legal issues, as well as no consistent linearity of judicial discussion. All cases are public law cases, broadly understood, in that they decide on the legality of, or otherwise guide, public action. However, they represent many different types of case, depending on how you might choose to categorise them. Thus, this body of cases includes the various types of actions that might be brought before the EU courts in terms of the jurisdictional classes set out in Section B(2). This jurisdictional categorisation is somewhat useful. It can be seen that, in different forms of action, different types of argument and reasoning resonate. For example, arguments challenging the legality of Community legislation have no place in Article 258 enforcement actions, thus preventing any legality arguments involving environmental principles in such cases.⁴⁰ However, the different types of action do not

³⁹ Section B(2); Chapter 1, text accompanying nn61-62.

⁴⁰ Case C-1/00 *Commission v France* [2001] ECR I-9989.

definitively dictate the manner in which the principles are treated in the case law, either in the arguments before, or in the reasoning of, the EU courts. Far from it; there are considerable overlaps in the judicial techniques used in relation to environmental principles in deciding cases across these different types of action. For example, similar techniques of using environmental principles to inform legal review tests may arise in both Article 263 and 267 cases, as explained above.

Further, in terms of the particular questions of EU law decided in this case law, the relevant legal issues considered do not define the legal roles of environmental principles. They may give rise to some predictable lines of doctrinal reasoning involving environmental principles, as in cases where the precautionary principle is used to inform the issue of proportionality of Member State action taken on precautionary grounds but infringing the Article 34 free movement of goods guarantee.⁴¹ However, the doctrinal reasoning employed in such cases overlaps with reasoning used by the EU courts in relation to different questions of EU law, revealing doctrinal connections between different EU legal questions through linked reasoning involving the precautionary principle.⁴² This demonstrates the openness and evolutionary state of EU law, and how the mapping exercise of this Chapter might be used to draw conclusions about the development of EU law,⁴³ as well as the conclusions for environmental law and environmental law scholarship.

In terms of subject-matter, again the case law is diverse, extending beyond narrowly ‘environmental’ matters.⁴⁴ The case law is in fact skewed by the number of

⁴¹ Section F(2)(e).

⁴² Section F(2)(b)-(d).

⁴³ Which is, however, beyond the scope of this thesis.

⁴⁴ Above n12.

public health cases in which the precautionary principle is discussed: Craig describes this highly contested area as an ‘eclectic’ area of EU law.⁴⁵ However, as discussed below, the role of the integration principle, which has extended the influence of the precautionary principle into these public health cases, has also begun to extend the role of other environmental principles in legal disputes involving other areas of EU competence, including competition and transport policy. The current subject-matter profile of EU cases involving environmental principles may thus represent a stage in the developing doctrine of environmental principles in EU law.

This assortment of legal and factual contexts in which cases involving environmental principles arise is not something that this thesis aims to organise, since these various classifications of EU law do not, alone, identify the roles played by the principles in EU case law. The limitations of these classifications are both exposed and cured by a doctrinal analysis of the case law. Thus the full range of these cases will be addressed together in the doctrinal mapping exercise of this Chapter, examining the judicial treatment of environmental principles in EU law with no presumed boundaries in the reasoning of the EU courts, so as to get a complete picture of the legal roles of environmental principles. The contextual considerations examined in this sub-Section are not tools or categories for mapping the case law, but attributes of the cases in EU law terms that colour and give depth to the resulting map.

⁴⁵ Craig, *EU Administrative Law*(n26) 473.

4 Results of Doctrinal Mapping: Treatment Categories Shaped by EU Legal Culture

In doctrinally mapping the EU case law involving environmental principles, the cases fall into three treatment categories. These are explained in this sub-Section in light of the jurisdiction of the CJEU set out in Section B(2) above. However these treatment categories need also to be understood in terms of the constitutional role of the Court and in terms of EU competence in environmental matters. This is because the role of the Court in reviewing and interpreting acts of ‘EU environmental competence’ determines the doctrinal role of environmental principles in these cases. This delimiting factor of ‘EU environmental competence’ is a notion that characterises EU environmental law; it is a central element of the (evolving) EU legal culture that shapes the roles of environmental principles in EU law.

As set out in the Introduction to this Chapter, ‘EU environmental competence’ is defined in this thesis as the area of EU-prescribed policy authority concerning environmental matters within which political institutions can *lawfully* act.⁴⁶ EU environmental competence is set out, first and foremost, in Title XX TFEU, which confers competence on EU institutions to act in the area of environmental policy.⁴⁷ As indicated above, this area of regulatory competence is *shared* with Member State governments, with the demarcation of policy authority determined by the principle of subsidiarity,⁴⁸ and with ‘EU’ environmental policy having to be based on the four environmental principles in Article 191(2). But ‘EU environmental competence’ is also

⁴⁶ Above, text accompanying nn11-12.

⁴⁷ TEU, Art 5(1).

⁴⁸ TEU, Art 5(1) & 5(3).

broader than this provision in the TFEU – partly due to, and having consequences for, the legal roles of environmental principles in EU law. This is so for two reasons.

First, through the EU courts' case law, the integration principle has expanded competence in environmental matters into other areas of EU competence, in particular to public health, agriculture, transport and competition policy. In these areas, there are constitutional constraints on the extent to which EU institutions can act,⁴⁹ and these delimit the scope of 'EU environmental competence' within these policy areas, as they do for action taken under Title XX. However, the integration principle is used by the courts to give EU environmental principles legal roles in these policy areas beyond the strict area of EU competence in Title XX, thereby intertwining different areas of EU competence and giving a broad reach to environmental concerns in EU policy generally. This is particularly the case for the precautionary principle described by the CFI in *Artegodan* as a 'general principle of Community law', which applied in the area of public health as well as environmental protection. This broader scope for the precautionary principle was a result of the integration principle and the common concern, expressed throughout the EC Treaty, to ensure a 'high level of protection' across different areas of competence, from environmental to health to consumer protection.⁵⁰ This has resulted in (a large number of) cases in which an EU environmental principle is employed by EU institutions in their expanded area of 'environmental competence', representing an overarching legal role for the integration principle in EU law. This integration principle expands the map in which environmental principles have legal roles by expanding the

⁴⁹ Determined by the TFEU's prescription of EU policy in these competence areas and EU law doctrines of subsidiarity, proportionality, and other grounds of review set out above: nn 27-31 and accompanying text.

⁵⁰ Chapter 2, nn195-197.

area of competence in which EU institutions might act on the basis of environmental principles.

The second sense in which ‘*EU* environmental competence’ is broader than that which appears in Title XX is due to the shared authority over environmental policy between the EU and its Member States. As is demonstrated in Section F(2), ‘Union policy on the environment’ in Article 191(2)⁵¹ is interpreted by the ECJ to extend beyond the environmental policy of *EU* institutions acting within their proper area of competence to include the environmental policy of *Member States* when acting within the scope of EU law (in particular, when Member State environmental regulation encroaches on areas of EU harmonisation or EU internal market rules). In this second expanded sense of EU environmental competence, environmental principles also have doctrinal roles to play, depending on the openness of the review tests applied by the courts. These legal roles are triggered when the EU courts have to decide legal questions relating to purported exercises of EU environmental competence, so broadly understood, and they fall into the three treatment categories which frame the map of this Chapter.⁵²

This broad notion of ‘EU environmental competence’ is central to mapping the legal roles of environmental principles in EU law. This is because, as will be seen in each treatment category, it is when EU or Member State institutions first take action within the scope of EU environmental competence, on the basis of environmental principles, that environmental principles will have a legal role – when that action is then interpreted or its legality tested in court. There are also other limiting factors on the legal roles of environmental principles in EU law – such as the extent of openness of the

⁵¹ Formerly ‘Community policy on the environment’: ex-174(2) TEC.

⁵² Particularly those mapped in Sections D and F.

review test relevantly applied by the Court (some Treaty provisions restrict the scope of EU environmental competence so as to generate review tests that leave no room for environmental principles in the Court's doctrine),⁵³ and the standing restrictions applied with respect to private litigants in bringing direct Article 263 actions⁵⁴ – but this competence limit is central. It indicates an implied jurisdictional limit accepted by the EU courts in considering arguments and developing doctrine by reference to environmental principles. However, this limit, including its responsiveness to action first taken by other institutions, is not a strait jacket for the Court. As discussed above, the very notion of EU environmental competence can be stretched by the Court's own reasoning, particularly on the basis of the integration principle. Further, the Court's interpretation of when other institutions have taken action on the basis of environmental principles is sometimes a matter only of the Court's interpretation.⁵⁵ And, at the edges of the case law mapped in this Chapter, the Court has begun to suggest that there are times when EU institutions *should* have acted on the basis of environmental principles within the broad scope of their EU environmental competence without any action first by those institutions, although this is a progression from the majority of the cases.

This idea of a competence limit determining the roles of environmental principles in EU law reveals two things. First, environmental principles can only be mapped in EU law by understanding the central role that competence plays in defining the roles of EU institutions and their shared policy responsibility with Member States in the area of the environment. Second, the idea of the Court being limited in its legal treatment of

⁵³ Section D(4); cf Section F.

⁵⁴ Case T-461/93 *WWF v Commission* [1994] ECR II-733; Case C-325/94P *WWF v Commission* [1996] ECR I-3727; noted (1997) JEL 183.

⁵⁵ Eg *Monsanto* (n5): see Section E(2)(a)

environmental principles reflects a self-conscious position as to its proper constitutional role in ensuring that the ‘law’ is observed in deciding cases before it and developing doctrine involving environmental principles. This constitutional role of the Court thus constrains the map of environmental principles in EU case law doctrine.

In light of this appreciation of the internal EU legal culture in which environmental principles have legal roles, the remainder of this Section sets out the three treatment categories that map the case law. The first treatment category – *policy cases* – comprises cases in which environmental principles are mentioned or argued about but the EU courts do not use them in any way to resolve the legal issue before them. Rather they treat the principles as policy ideas that *are yet* to be applied in legislative or decision-making processes of EU and Member State institutions acting within the scope of EU environmental competence, or that *have been* applied otherwise in such processes by EU institutions exhaustively. Environmental principles do not act as independent legal standards against which *any* EU action might be reviewed, or any Member State action might be defended. In all these cases, the EU courts are not being asked to interpret or determine the lawfulness of particular EU or Member State action taken within the scope of EU environmental competence on the basis of environmental principles; thus they have no proper role to engage with legal arguments involving environmental principles. Also in this category of cases are those in which the principles are mentioned as part of the policy background to the case. In all these cases, environmental principles have no doctrinal roles. Rather, environmental principles remain policy ideas that are for the non-judicial institutions of the EU to pursue and implement, with no legal compulsion for them to do so.

The second treatment category – *interpretive cases* – comprises those cases in which EU courts use environmental principles purposively to interpret EU legislation

enacted on the basis of EU environmental competence, or EU Treaty provisions that fall within the scope of EU environmental competence. The judicial technique adopted with respect to environmental principles in these cases is teleological interpretation that engages the relevant principles as purposes underlying the relevant legislation (with EU institutions having legislated on the basis of these principles), or as purposes which inform how a Treaty provision *should* be interpreted and applied by EU institutions. Environmental principles then elaborate the nature and direction of the EU environmental competence exercised, or to be exercised, by these ambiguous provisions. The general and open formulation of environmental principles gives the court a broad discretion in such interpretive tasks, so that the principles are themselves interpreted in these cases and given marginal definitions by the courts as they are used to clarify ambiguous EU legislation or Treaty provisions in the particular manner chosen by the Court.

The third treatment category – *informing legal test cases* – is the group of cases in which environmental principles are used in reviewing the lawful boundaries and exercise of EU environmental competence. These include two different types of cases: *legal basis cases* (informing legal tests reviewing the boundaries within which EU institutions must exercise their Treaty competence in environmental matters for this to be lawful), and *exercise of EU environmental competence cases* (informing tests of review that determine the lawfulness of environmental competence exercised within the scope of EU law). In both these cases, either EU or Member State institutions have (purportedly) exercised EU environmental competence on the basis of environmental principles, but the validity of this exercise is under review. And in both cases, environmental principles are used to inform the relevant legal review tests applied, giving rise to the judicial technique that defines this treatment category. The central issue of these cases is the proper extent of discretionary power afforded to these institutions, acting within the scope of EU law, to

adopt environmental policy on the basis of environmental principles, rather than any particular line of policy to be adopted by these institutions. This includes the relative scope of discretion allowed to EU and Member State institutions in exercising the shared competence over environmental matters within the EU. Again, environmental principles define and delimit the nature of EU environmental competence, broadly understood, rather than compelling its exercise in any way.

The second set of cases in this third treatment category – exercise of EU environmental competence cases – is the most voluminous and complex. These cases are complex because they include review of both EU and Member State action in environmental matters (particularly including public health matters), and because of the doctrinal openness and novelty of the review tests that environmental principles are used to inform, including the rule of reason, proportionality and manifest error of assessment. Further, with respect to the precautionary principle, a *new* review test is generated by the precautionary principle itself: a test of ‘adequate scientific evidence’. The precautionary principle, in light of the Commission Communication on the precautionary principle (‘Communication’),⁵⁶ is used to generate this legal review test, which is applied to review EU and Member State discretion exercised in public health cases. While the courts are in fact using a different reasoning technique with respect to the precautionary principle from *informing* legal tests by *generating* a new legal test, these cases are considered together because, in all cases where this new test is applied, the courts then use its application to inform a broader review test. This makes for somewhat confusing analysis, but this

⁵⁶ Commission of the European Communities, ‘Communication from the Commission on the Precautionary Principle’, COM (2000) 1 (‘Communication’). See Chapter 3, text accompanying nn93-101.

simply reflects the confusing doctrinal role of the precautionary principle in EU law, as its general and flexible formulation allows.

These three treatment categories demonstrate that environmental principles have legal roles in EU law that match three different techniques of judicial reasoning – avoidance of their use altogether in developing doctrine, use as interpretive aids, and use to inform legal review tests. These treatment categories are not qualitatively equivalent in a taxonomic sense – they involve different types of judicial reasoning *and* different reasons. In particular, the policy cases avoid doctrinal reasoning involving environmental principles for several distinct reasons, which are not neatly or logically connected. Rather, these three treatment categories are to be understood as reflecting key elements of EU legal culture – including the central role of competence in EU environmental law, the jurisdiction of the CJEU, and the constitutional limits of the Court’s role – which shape their operation and significance. The doctrinal roles of environmental principles in EU law are mapped within these categories in the Sections that follow, reflecting and expressing these elements of EU legal culture. Firstly, however, the principle of sustainable development is considered separately, demonstrating the rough edges of these treatment categories in mapping the case law involving environmental principles.

C PRINCIPLE OF SUSTAINABLE DEVELOPMENT

This section is a short one, making a simple point: that the sustainable development principle is different from other EU environmental principles in terms of its legal

treatment.⁵⁷ Indeed, it has an ambiguous, evolving and ill-defined legal role. While it does feature in the treatment categories examined in Sections D to F below (although often with a difference due to its definitional ambiguity and reach beyond environmental matters)⁵⁸ its doctrinal role in the cases is more complicated, indicating that there is no perfect doctrinal map of environmental principles in EU law.

Thus, in one case, it is suggested that sustainable development is a ‘*fundamental concept of environmental law*’, deriving from the international sustainable development agenda, which finds specific expression in the Article 11 TFEU integration principle.⁵⁹ In another, sustainable development is an ‘objective’ of the EU of such importance (including sustainable development of ‘Europe, and even of the Earth’) that the other EU principles ‘framing environmental law’ are suggested to take on ever-increasing importance in the future of EU law.⁶⁰ In the *Environmental Crime case*, Advocate-General Ruiz-Jarabo Colomer describes sustainable development differently again, as a ‘*legal interest the protection of which inspires other [EU] policies, a protective activity which may be clarified, furthermore, as an essential objective of the [EU] system*’.⁶¹ What these various statements indicate about the legal nature of sustainable development in terms of EU law doctrine is uncertain on the current state of the law,⁶² but they do indicate that the overarching nature of sustainable development, and its connection to the

⁵⁷ This is not to say that *other* EU environmental principles have equivalent doctrinal roles. The integration principle and precautionary principle, in particular, have distinctive roles in the reasoning of the EU courts: Sections D-F.

⁵⁸ Below, text accompanying nn196-200.

⁵⁹ Case C-371/98 *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping* [2000] ECR I-9235, Opinion of Advocate-General Leger (7 March 2000).

⁶⁰ Case C-277/02 *EU-Wood-Trading v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz* [2004] ECR I-11957, Opinion of Advocate-General Leger (23 September 2004) [9].

⁶¹ Case C-176/03 *Commission v Council (Environmental Crime)* [2005] 3 CMLR 20, Opinion of Advocate-General Colomer (26 May 2005) [59].

⁶² Beyond the doctrinal roles for the sustainable development principle set out in Sections E and F below.

international sustainable development agenda, gives this ‘principle’ a different complexion in EU law.

Further, the legal role of the sustainable development principle is complicated by its definitional ambiguity. The concept of sustainable development is so broad, and contested, that it has been implicated in widely varying cases. Thus, in the *Small Weapons case*, sustainable development is found to be concerned with poverty alleviation and social development.⁶³ On the other hand, in *First Corporate Shipping*, Advocate-General Leger draws on the Brundtland Report to assert that sustainable development ‘means that the conduct of [EU] policies must, at the very least, not endanger the natural systems which give us life, the atmosphere, water, earth and living creatures’.⁶⁴ This definition of sustainable development is much more focused on environmental protection. Then again, in *Spain v Council*, Advocate-General Leger suggests that the ‘objective’ of sustainable development (used almost interchangeably with ‘sustainable use’) in EU environmental policy must be understood in light of the ‘rule that natural resources must be used in a rational manner’.⁶⁵ In this case, sustainable development is marginally defined in more precise environmental protection terms, and then used in a convoluted manner to inform a legal basis test in relation to EU legislation approving the EC’s accession to a Convention concerning the protection and sustainable use of the Danube River.

⁶³ Case C-91/05 *Commission v Council (Small Weapons)* [2008] 3 CMLR 5 [93]

⁶⁴ *First Corporate Shipping*, Opinion of Advocate-General Leger (n59).

⁶⁵ Drawn from Article 191(1) TFEU (ex-Article 174(1) EC): Case C-36/98 *Spain v Council* [2001] ECR I-779, Opinion of Advocate-General Leger (16 May 2000) [77].

As a result, not only is the meaning of sustainable development unclear, but this lack of clarity only compounds its uncertain legal role.⁶⁶ The connection to international environmental law does not bring any legal clarity in terms of its role in EU law, but it does mark out sustainable development as being different from other EU environmental principles. While it is similar to the integration principle in being overarching in EU law, embracing other environmental principles and crossing different areas of EU policy competence, its doctrinal role is more uncertain, in light of its extension to policy areas beyond even an expanded notion of EU environmental competence,⁶⁷ as well as the ambitious and hopeful statements made about its legal nature, particularly by Advocate-General Leger in the cases mentioned above.

All this ambiguity reflects the fact that, at their core, environmental principles are general, undefined and imprecise policy ideas, for which there are no obvious or pre-determined legal roles. Within EU law, environmental principles do take on identifiable doctrinal roles, as this Chapter will now map, but the sustainable development principle is exceptional, since it is not obviously a ‘principle’ nor is it always used doctrinally by the EU courts in their reasoning. This conclusion reinforces the argument in Chapter 3 that environmental principles cannot simply be imbued with legal force to solve environmental problems, no matter how important the policy idea they represent. How environmental principles take on legal roles, if they do, depends highly on the particular legal context concerned and how it develops (or does not develop).

⁶⁶ This is different from cases in the treatment categories considered in Sections E and F below, in which environmental principles are given varying marginal definitions across cases, but consistent and doctrinal patterns are discernable.

⁶⁷ As in *Small Weapons Case* (n63): below Section F(1).

However, some doctrinal order can be discerned in the reasoning of the EU courts involving environmental principles. This is demonstrated in the following three sections, which examine the treatment categories set out in Section B above.

D POLICY CASES

The first treatment category comprises *policy cases* – cases in which environmental principles are raised in argument, or mentioned or discussed by the EU courts, but are legally irrelevant in deciding the legal question at issue. Advocate-General Sharpston, in the ECJ appeal in *Land Oberösterreich*, observes why EU courts are often reluctant to engage with, in this instance, the precautionary principle to resolve particular legal issues, although this observation is not decisive in relation to the legal question at issue.⁶⁸ In this case, the Austrian government had defended its national ban on genetically modified plants and animals, which contravened an applicable EU Directive, arguing that the Commission's refusal to approve the ban did not adequately take into account the precautionary principle. Reflecting the view of the CFI at first instance, Advocate-General Sharpston observed that:⁶⁹

...the concerns [raised by the Austrian government in argument] are *policy concerns* which must be dealt with in political fora. It is not for this or any other court to determine proper national or Community environmental policy. And the concerns in question are *not in themselves directly relevant to the legal issues* raised in this case...

This idea of separation between legal issues and environmental principles as policy concerns filters through the cases in this treatment category, reflecting the fact that

⁶⁸ Below, text accompanying nn109-112.

⁶⁹ Joined Cases C-439/05 P and C-454/05 *Land Oberösterreich v Commission* [2007] 3 CMLR 52, Opinion of Advocate-General Sharpston (15 May 2007) [145]. In its decision, the ECJ upheld the decision of the CFI, but did not comment on Austria's precautionary principle argument specifically: Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich v Commission* [2007] 3 CMLR 52 (ECJ).

the legal issues in these cases do not involve the review or interpretation of EU environmental competence first exercised by EU or Member State institutions, or they *do* involve review of such purported institutional action, but find that it has been unlawfully exercised, excluding any further legal role for environmental principles in defending the contested action. Further, the EU courts have no business legally *compelling* EU institutions to take particular policy actions on the basis of environmental principles, and they resist arguments encouraging them to do so. As a result, there is no room for the courts to consider legal arguments based on environmental principles. Rather, environmental principles articulate policy positions to be first adopted at the discretion of EU and Member State institutions within the scope of EU environmental competence, and that discretion has not been exercised at all, or it has been exercised but is not at issue in the cases, or it has been exercised unlawfully in EU law terms. Environmental principles appear as policy ideas, which inform EU environmental competence generally but have no effect on the legal outcome of these cases.

Four kinds of policy cases are identifiable in this treatment category. First, those cases in which the principles are observed as part of the policy background to the case, but have no doctrinal role in its resolution.⁷⁰ Second, those cases in which the policy discretion conferred by EU environmental principles has *yet to be exercised* in an area of EU environmental competence not yet subject to harmonisation, and which exercise the courts have no business to compel.⁷¹ Third, those cases in which the policy discretion of the EU legislative institutions *has been exercised* to harmonise or otherwise legislate in

⁷⁰ Joined Cases C-164/97 & C-165/97 *Parliament v Council (Forest Protection)* [1999] ECR I-1139, Opinion of Advocate-General Jacobs (17 December 1998); Case C-318/98 *Fornasar* [2000] ECR I-4785; Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* [2005] ECR I-2753; Case C-494/01 *Commission v Ireland* [2005] ECR I-3331; *Environmental Crime, Opinion of Advocate-General Colomer* (n61).

⁷¹ Case C-379/92 *Re Peralta* [1994] ECR I-3453; Case C-445/00 *Austria v Council* [2003] OJ C264/5.

an area of EU environmental competence, on the basis of environmental principles, but where the exercise of such competence is not the subject of legal inquiry.⁷² Arguments challenging *related* EU action on the basis of environmental principles, or defending Member State action *outside* the relevant scheme of EU legislation on similar grounds, are rejected by the Court. Environmental principles do not constitute free-standing legal standards for compelling, interpreting or defending EU and Member State environmental actions generally. Fourth, those cases in which Member States have purported to exercise EU environmental competence, on the basis of the precautionary principle in particular (derogating from internal market harmonising measures on environmental grounds under Article 114(4) and (5) TFEU), but have done so unlawfully in terms of the Treaty, thus leaving no room for legal arguments based on environmental principles.⁷³ In this final sub-set of cases, the explicit narrowness of the relevant review tests in the TFEU limits the discretion of Member States to exercise EU environment competence and thus limits the legal roles of environmental principles.

Cases in all these four groups are linked by the common theme that, while environmental principles might provide a policy basis for EU environmental competence (within the limits of the Treaty), they are not principles that are directly engaged or relevant in resolving the legal issues before the courts. They have no doctrinal roles. Rather, the principles are part of EU and Member State institutional decision-making processes (legislative or administrative) relevant to these cases, whether in the

⁷² *Standley* (n32); Case C-6/99 *Association Greenpeace France v Ministère de l'Agriculture et de la Pêche* [2000] ECR I-1651; *Monsanto* (n5); Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I 7405; Case C-132/03 *Ministero della Salute v Codacons* [2005] ECR I-3465; Case C-221/06 *Stadtgemeinde Frohnleiten v Bundesminister für Land-und Forstwirtschaft* [2008] 1 CMLR 30.

⁷³ Case C-3/00 *Denmark v Commission (Sulphites)* [2003] ECR I-2643; Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria v Commission* [2005] ECR II-4005.

background or built into the legislative structure under consideration, but not legally at issue or justiciable. Or, they are excluded altogether from the institutional decision-making processes concerned by explicit limits within the Treaties.

The following four sub-Sections consider representative cases that fall within these four sub-sets of policy cases. The Section concludes by examining a further group of cases that challenge the boundaries of this treatment category, by extending the Court's role in reviewing EU action on the basis of environmental principles. This deviation in the case law is potentially revolutionary in terms of the legal roles that environmental principles might play in EU law, but it is an outlying doctrinal development for now.

1 Principles as Policy Background

In this first sub-category of EU policy cases, the references to environmental principles are passing ones. The EU courts observe the principles as part of the contextual policy background to the case, but they play no direct role in justifying the reasoning of the particular decisions.

One such case is *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*,⁷⁴ in which the interpretation of the Landfill Directive and Article 193 TFEU (ex-Article 176 EC) were at issue.⁷⁵ The ECJ found that German national landfill measures, which were more stringently protective than those set out in the Directive, were compatible with EU law, primarily because the EU rules did not exhaustively harmonise this area of waste regulation. In finding that the Landfill Directive permitted this shared regulation of German landfill waste, the ECJ set out the policy background informing the adoption of

⁷⁴ *Deponiezweckverband Eiterköpfe* (n70).

⁷⁵ Council Directive (EC) 1999/31 on the landfill of waste [1999] OJ L182/1 ('Landfill Directive').

the Directive, including the four principles in Article 191(2) TFEU (ex-Article 174(2) EC).⁷⁶

Another policy case, in which the principle of sustainable development is discussed by the Advocate-General with some enthusiasm to set out the policy background of the case,⁷⁷ is *Commission v Council (Environmental Crime)*.⁷⁸ In this case, Advocate-General Ruiz-Jarabo Colomer considers the nature of sustainable development in the EC Treaty, in light of the overall ‘globalisation’ of environmental policy concerning sustainable development, in order to ‘[illustrate] the importance which “ecological consciousness” has acquired in recent decades’.⁷⁹ This global policy background provides a platform from which the Advocate-General then develops a radical legal argument – that Community competence to develop environmental policy should go so far as to require criminal sanctions where this is the only ‘effective, proportionate and dissuasive’ means for its enforcement.⁸⁰ While the sustainable development principle is not used doctrinally in this legal conclusion – indeed, it is not mentioned by the ECJ, which arrives at the conclusion suggested by the Advocate-General – the principle paints a policy picture that contextualises the legal arguments made to support the Court’s ultimate conclusion.⁸¹

⁷⁶ *Deponiezweckverband Eiterköpfe* (n70) [28].

⁷⁷ Although not consistently described as a ‘principle’; also described as a ‘concept’.

⁷⁸ Case C-176/03 *Commission v Council (Environmental Crime)* [2005] 3 CMLR 20.

⁷⁹ *Environmental Crime, Opinion of Advocate-General Colomer* (n61) [61]-[71].

⁸⁰ *Ibid* [72].

⁸¹ In which the integration principle does have a doctrinal role: below, text accompanying nn191-192.

2 Principles of EU Environmental Competence – Unexercised Discretion

In this second sub-category of policy cases, the EU courts reject arguments based on environmental principles, finding them legally irrelevant since environmental principles are limited to defining policy discretion within the scope of EU environmental competence and do not empower the courts to compel its exercise. It is in this sense that EU environmental policy ‘*shall* be based’ on the four environmental principles set out in Article 191(2). Environmental principles thus do not justify stand-alone legal arguments for compelling environmental action within the scope of EU environmental competence. Rather, EU courts will wait for institutions to exercise their discretion within this area before employing environmental principles doctrinally.

Re Peralta is the central case in this sub-category.⁸² This is a case in which the ECJ finds that it has no business compelling the exercise of EU environmental policy discretion. It involved an Article 267 TFEU (ex-Article 177 TEC) reference to the ECJ from an Italian court asking, inter alia, whether an Italian law that prohibited national vessels from discharging certain harmful substances into the sea, in contravention of internationally accepted practice, was precluded by the preventive principle.⁸³ The ECJ found that the preventive principle did not preclude the national legislation because Article 191 TFEU (ex-Article 174 TEC) is ‘confined to defining the general [environmental] objectives of the Community’.⁸⁴ Moreover it is the responsibility of the Council to determine what action is to be taken in this policy field, and Article 193 TFEU

⁸² *Re Peralta* (n71). See also *Austria v Council* (n71).

⁸³ This argument may seem counter-intuitive; the argument put to the Italian court was that the level of environmental protection required by the preventive principle in the Treaty should match that set out in the MARPOL Convention (*UNTS*, vols 1340 and 1341, no 22484), the relevant provisions of which were not as stringent as those in Italian national law.

⁸⁴ *Re Peralta* (n71) [57].

(ex-Article 176 TEC) allows Member States to adopt more stringent environmental protective measures in any case, so long as they are compatible with the Treaty.

This reasoning can be read in one of two ways. Firstly, the appeal to the preventive principle was unsuccessful since Article 191(2) extends only to EU environmental policy, and does not affect Member State actions,⁸⁵ at least to the extent that they are acting outside the scope of EU law.⁸⁶ However the ECJ does not explicitly say this – it refers instead to the general nature of Article 191, to the responsibility of the Council to adopt EU environmental policy, and to the latitude afforded to Member States to adopt complementary and more protective measures. The better way to read this case is that the preventive principle argument was unsuccessful because the ECJ was being asked to adopt and compel an environmental policy position, which it feels it is not its job to do. While Member State action was at issue, EU environmental policy and Member State environmental policy (covering common territory) overlap (as acknowledged by Article 193), and, while the EU could take action in this unharmonised area if it wanted to, whether it does so is not an issue for the EU courts. The preventive principle did not have legal force beyond its general policy prescription role.⁸⁷

⁸⁵ N de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12(2) European Law Journal 139, 143.

⁸⁶ Cf Section F(2)(e) below.

⁸⁷ This position is reinforced by Advocate-General Kokott in Case C-378/08 *Raffinerie Mediterranée (ERG) v Ministero dello Sviluppo Economico* [2010] 3 CMLR 9, where she rejects a preliminary reference question suggesting Article 191 as a legal basis for assessing national rules on environmental liability; rather Article 191 'simply sets out the general objectives of [EU] environmental law, which the [EU] legislature must give substance to before they can be binding on the Member States': Case C-378/08 *Raffinerie Mediterranée (ERG) v Ministero dello Sviluppo Economico* [2010] 3 CMLR 9, Opinion of Advocate-General Kokott (22 October 2009) [45]; approved by the ECJ: *ERG* [46].

3 Principles of EU Environmental Competence – Exercised but Unchallenged Discretion

In this third sub-set of policy cases, environmental principles have been unsuccessfully relied on in argument either to challenge or to interpret EU legislative schemes regulating environmental and public health matters. The EU courts have found, with respect to each legislative scheme examined, that environmental principles were legally relevant only in guiding the policy discretion afforded to EU or Member State institutions in exercising decision-making power under, or in implementing, the elements of these schemes which are based on environmental principles. The exercise of such discretion, which relevantly exhausts the legal roles of environmental principles in these cases, was however not at issue. Rather, legal arguments are made in these cases, on the basis of environmental principles, to challenge or defend EU action and Member State action in relation to these schemes more broadly. But, environmental principles do not support independent legal arguments for challenging or interpreting EU environmental action generally.

In these cases, environmental principles are identified by the ECJ as legally relevant in guiding institutional policy discretion within EU environmental regulatory frameworks in three different senses, but having no role in deciding the outcome of each case. Thus environmental principles are to be taken into account by Commission decision-making processes supporting the regulatory scheme under consideration;⁸⁸ they are to guide Member State discretion in opting out of a regulatory scheme through a safeguard clause based on the principles;⁸⁹ or they are to guide Member State discretion

⁸⁸ *Monsanto* (n5); *Codacons* (n72).

⁸⁹ *Greenpeace* (n72); *Monsanto* (n5).

in implementing the relevant scheme.⁹⁰ Such decision-making processes or discretion are not subject to legal scrutiny in these cases, and reflect the policy-making elements of the schemes considered that are based on environmental principles, or assumed to be so based, by the courts. Beyond influencing such policy-making discretion, environmental principles are found to have no doctrinal role to play in testing the legality of, or interpreting, the measures in issue.

Several of the cases in this sub-Section involve harmonising EU legislation relating to genetically modified organisms (GMOs). In these cases, the precautionary principle has a role in guiding the policy discretion exercised by EU institutions making decisions within the frameworks of harmonised GMO regulation, and that of Member States under relevant safeguard clauses. This exhausts any broader legal role for the precautionary principle in challenging elements of these regulatory schemes.

An example is *Ministero della Salute v Codacons*.⁹¹ This was a preliminary reference from an Italian court concerning the interpretation of Article 2(2)(b) of Regulation 1139/98 on the compulsory labelling of certain genetically modified (GM) food.⁹² Article 2(2)(b) provided an exception from the Regulation's labelling requirements in the case of foodstuffs where the concentration of GM food was less than 1% and such presence was 'adventitious'. The issue for the ECJ was whether that exception applied to infant food, and the Court found that it did, since there was no indication from the wording, the context or the purpose of Article 2(2)(b) that it should not so apply, and EU measures adopted with respect to the labelling of infant food had

⁹⁰ *Standley* (n32); *Stadtgemeinde* (n72).

⁹¹ *Codacons* (n72).

⁹² Council Regulation (EC) 1139/98 concerning the compulsory indication on the labelling of certain foodstuffs produced from genetically modified organisms [1998] OJ L159/4 (as amended) Art (2)(b).

not been extended to derogate from this provision.⁹³ There was no room for calling into question this interpretation ‘on the basis of the precautionary principle’, which was found to be applicable only as part of the decision-making process involved in putting the relevant GM foods on the market in the first place, which is intended to ensure that the genetically modified organisms (GMOs) are safe for the consumer.⁹⁴ Once such a decision had been made, there was no longer any relevant ‘uncertainty as to the existence or extent of risks to human health’, a ‘presupposition’ of the precautionary principle.⁹⁵ The Court made no attempt to explore this decision-making process, since it was not challenged in argument (or because the referred question did not extend that far).⁹⁶ In any case, the precautionary principle, whatever it involves, was confined to influencing the policy decision-making of the Commission and not the legal issue of interpretation before the Court.

Monsanto is another GM food case in which the precautionary principle was raised in argument, largely unsuccessfully. *Monsanto* developed out of the Italian government’s abiding concern over the risks involved in releasing GMOs and putting GM products on the market. At issue in the case was the ‘simplified procedure’ in Regulation 258/97 on novel foods for authorising the introduction of novel GM foods on to the European market, which could be employed when a novel food was produced from, but no longer contained, any GMOs, *and* when it was ‘substantially equivalent’ to an existing food.⁹⁷ This procedure required mere notification to the Commission once substantial

⁹³ *Codacons* (n72) [54]–[55].

⁹⁴ *Ibid* [56], [63].

⁹⁵ *Ibid* [61].

⁹⁶ Cf *Pfizer* (n29): Section F(2)(b).

⁹⁷ Council Regulation (EC) 258/97 concerning novel foods and novel food ingredients [1997] OJ L43/1 Arts 3(4), 5.

equivalence was established (by existing science or in the opinion of a relevant national food authority), and no detailed risk assessment by the Commission, as required by the formal (non-simplified) novel food authorisation process. The Italian government, relying on the safeguard procedure in Article 12,⁹⁸ passed a decree temporarily banning novel foods produced from particular strands of GM maize that still contained small amounts of transgenic protein. This decree was challenged in the Italian national courts by the producers of the GM maize (Monsanto). The Italian court referred several questions to the ECJ, the two most relevant concerning (a) the interpretation of the safeguard clause in Article 12, particularly in relation to the ability of Member States to take action on the basis of the precautionary principle, and (b) the legality of the ‘simplified procedure’, in particular whether it breached Articles 169 and 191 TFEU (ex-Articles 153 and 174 EC) and the precautionary and proportionality principles.

Arguments on the basis of the precautionary principle were made on both issues, suggesting that the principle might have a legal role which overlaid the scheme of the Regulation, and which could be relied on by the Member States. To an extent a legal role was given to the precautionary principle as an aid in interpreting Article 12, discussed in Section E below.⁹⁹ However, it was not a legal role independent of the scheme of the Regulation, since the Court found that a Member State could only take action on the basis of the precautionary principle in accordance with Article 12, which is based on and gives legislative expression to the principle. When it came to the legality challenge, the ECJ gave short shrift to the precautionary principle-based argument, finding that the precautionary principle was already relevantly taken into account in the authorisation and

⁹⁸ Ibid, Art 12.

⁹⁹ Below Section E(2)(a).

safeguard decision-making procedures set up by the Regulation.¹⁰⁰ The precautionary principle was not a legal ground for reviewing the legality of the simplified authorisation procedure; rather, as in *Codacons*, it was to be taken into account in the decision-making processes involved in the normal authorisation and safeguard procedures of the Regulation, undertaken by the Commission.

Two representative environmental cases also fall into this sub-set of policy cases. *Standley* involved a challenge to the legality of provisions of Directive 91/676 on nitrate pollution from agricultural sources,¹⁰¹ on the basis of, inter alia, infringement of the principle of rectification at source and the polluter pays principle.¹⁰² In this case, the principles were found not to be exhausted by the provisions of the Directive, rather they were consistent with, and should be observed by, these principles. The Directive's scheme was based on the environmental title of Treaty competence and its provisions were sufficiently flexible for the Member States to implement its measures in accordance with the principle of rectification at source and polluter pays principle.¹⁰³ The result of the case is that, until the Directive is interpreted and applied by the Member States in a manner that is incompatible with those principles, they remain principles of policy that are incorporated into the provisions of the Directive and guide the discretion of Member States in overseeing their implementation into national law.

The second environmental case is *Stadtgemeinde Frohnleiten*,¹⁰⁴ which concerned the shipment of waste from Italy to Austria. In the course of deciding the legal issue in

¹⁰⁰ *Monsanto* (n5) [133].

¹⁰¹ Council Directive (EC) 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

¹⁰² *Standley* (n32).

¹⁰³ *Ibid* [51]-[53].

¹⁰⁴ *Stadtgemeinde* (n72)

this case – whether an Austrian tax on contaminated waste breached Article 110 TFEU¹⁰⁵ – the ECJ considered the extent to which a Member State can rely on the principles of proximity and self-sufficiency to defend the operation of a tax that discriminated against imported waste. These environmental principles are not found in the Treaties but are principles of EU waste policy, which generally provide that waste should be treated (recovered or disposed of) as near to its source as possible, and that a designated area (region, Member State, or the EU) should be self-sufficient in dealing with its own waste.¹⁰⁶ These environmental principles extend the group of legally relevant EU environmental principles. In this case, there was no scope for a Member State to rely on these principles to justify a discriminatory tax because they had already been relied on by the EU institutions in harmonising waste shipment regulation within this area of EU environmental competence,¹⁰⁷ thereby exhausting their legal roles and limiting the discretion of Member States to take independent environmental action. Member States could only rely on these environmental principles, to object to or hinder imported waste on environmental grounds, by following the explicit procedures implementing these principles in the Waste Shipment Regulation. They could not rely on them as independent grounds of legal argument in this case, which raised a different legal question.

¹⁰⁵ Ex-Article 90 EC.

¹⁰⁶ On the ambiguous meaning of these principles: E Scotford, 'The New Waste Directive - Trying to Do it All... An Early Assessment' 11(2) Env LR 75, 87-88.

¹⁰⁷ Council Regulation (EC) 259/93 on the supervision and control of shipments of waste within, into and out of the EC [1993] OJ L030/1 ('WSR').

4 Purported Exercises of EU Environmental Competence: Member State Derogation under Articles 114(4) and (5) TFEU

This final sub-set of policy cases comprises cases in which Member States purport to exercise EU environmental competence on the basis of environmental principles, but do so unlawfully because their action is outside the permissible bounds of the Treaty, thereby restricting doctrinal roles for environmental principles in subsequent legal actions. While environmental policy is a shared competence, the scope for unilateral Member State environmental action is restricted by harmonising measures taken by EU institutions, whether in relation to environmental policy (as in *Stadtgemeinde Frohnleiten* above), or in relation to the internal market. In relation to internal market harmonising measures, Article 114 TFEU explicitly provides restricted grounds for Member States to take unilateral action with respect to environmental protection where this conflicts with a harmonising measure. These limited grounds give rise to Treaty-based ‘review’ tests for examining the legality of derogating Member State action. In this sub-set of cases, the ECJ rejects arguments of Member States defending such derogation from internal market harmonising measures on the basis of the precautionary principle. Such arguments are rejected since they are not directly relevant to the particular legal inquiries required by Articles 114(4) and (5), which set out precise and limited circumstances in which Member States are permitted to derogate from harmonising measures, leaving no room for consideration of the precautionary principle.¹⁰⁸ The ECJ finds that the Treaty precludes Member States having any discretion to exercise EU environmental competence on the basis of the precautionary principle. Arguments based on the

¹⁰⁸ Ie these review tests are not sufficiently open to allow the EU courts to use environmental principles to inform their application: cf Section F(2)(e).

precautionary principle are thus dismissed as considerations that should be addressed in national and EU political arenas.

In *Land Oberösterreich*, mentioned above,¹⁰⁹ the Austrian government had sought to derogate from Directive 2001/18 on the release of GMOs (a harmonising measure) by imposing, in a particular farming area, a general ban on the cultivation of genetically modified plants or seed, and on the breeding and release of transgenic animals.¹¹⁰ The Commission had refused to allow this derogation, and the CFI and ECJ supported the Commission's position,¹¹¹ since Austria had failed to fulfil the conditions in Article 114(5) that permit derogation (in particular, it failed to present 'new scientific evidence' and to identify 'a problem specific to that Member State'). Arguments that the Commission had failed adequately to consider the precautionary principle in assessing the submissions of the Austrian government, in this case where the risks associated with releasing and propagating GMOs were highly contestable, thus failed. In this case, arguments based on the precautionary principle added nothing to the legal conditions imposed by the Treaty. The precautionary principle was found to belong in the harmonised policy domain of EU environmental competence, so that each GMO underwent rigorous assessment by the Commission of the potential risks it might pose for environmental and human health, in accordance with the precautionary principle, in order to be approved for release under the procedures laid down in Directive 2001/18. The precautionary principle had no further doctrinal role in relation to the particular tests,

¹⁰⁹ Above, text accompanying n69.

¹¹⁰ Council & Parliament Directive (EC) 2001/18 on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1.

¹¹¹ *Land Oberösterreich (CFI)* (n73); *Land Oberösterreich (ECJ)* (n69). See also Case C-3/00 *Denmark v Commission (Sulphites)* [2003] ECR I-2643, Opinion of Advocate-General Tizzano (30 May 2002) [100] in relation to Article 114(4).

mandated by the Treaty conditions in Article 114(5), applied by the ECJ to decide this case.¹¹²

In these policy cases, environmental principles again do not constitute free-standing legal arguments, here for defending Member State action on environmental grounds. In these cases, the purported exercise of EU environmental competence by the Member States was unlawful under the internal market provisions of the Treaty, which relevantly limit the scope of EU environmental competence exercised by Member States, and thus the doctrinal roles of environmental principles in EU law.

5 Integration Principle: Breaking Down the Barrier of Policy Cases?

In the policy cases considered so far, EU courts have found that environmental principles have no doctrinal role. In these cases, the legal questions at issue have not concerned the exercise, by EU or Member State institutions, of EU environmental competence based on environmental principles, either directly or lawfully. There are however a couple of cases in which this competence limit, which demarcates policy cases and constrains the Court's role in developing doctrine with respect to environmental principles, is stretched or overridden. These cases involve the integration principle (and other environmental principles incidentally to or in combination with, the integration principle) as an independent legal ground for challenging EU action *generally*. These cases suggest that environmental principles might have an overriding legal role in constraining *all* action within the scope of EU law, which can be challenged by way of review in court, giving

¹¹² Cf Case C-165/08 *Commission v Poland* (ECJ 16 July 2009). In pre-litigation procedure, the Polish government raised a similar precautionary principle argument to defend a measure derogating from Directive 2001/18, but shifted to an (unsuccessful) argument based on ethical principles: *ibid* [59] and generally.

the CJEU a robust constitutional role and undermining the policy discretion of EU institutions (and potentially Member State institutions acting within the scope of EU law).

Early cases militated against such a view, but left room for its development. In *Austria v Parliament*,¹¹³ a case involving a challenge to the legality of an EU Regulation establishing an eco-points system for heavy goods vehicles under the EU's transport policy, the Austrian government argued that the Regulation violated the 'objective of promoting sustainable development laid down in [Article 11 TFEU]' because it resulted in an increase of NO_x emissions.¹¹⁴ Advocate-General Geelhoed responded to this argument by finding that the integration principle in Article 11 does not act with 'simple rigidity' as a binding rule: 'it cannot be regarded as laying down a standard according to which in defining [EU] policies environmental protection must always be taken to be the prevalent interest'.¹¹⁵ The Court's role did not extend to 'unacceptably [restricting]' the discretionary powers of the EU institutions in this way. However, the Advocate-General did suggest that where ecological interests 'manifestly have not been taken into account or have been completely disregarded', the integration principle may serve as the standard for reviewing the validity of EU legislation.¹¹⁶ Advocate-General Jacobs picked up on this suggested legal role for the integration principle in *PreussenElektra*, arguing that it is 'not merely programmatic; it imposes legal obligations'.¹¹⁷

¹¹³ Case C-161/04 *Austria v Parliament and Council (Ecopoints)* [2006] ECR I-7183.

¹¹⁴ Case C-161/04 *Austria v Parliament and Council (Ecopoints)* [2006] ECR I-7183, Opinion of Advocate-General Geelhoed (26 January 2006) [54].

¹¹⁵ *Ibid* [59].

¹¹⁶ *Ibid*. Another proviso was that the totality of measures in a policy area needs to be taken into account. This case was withdrawn by the Austrian government before it was decided by the ECJ.

¹¹⁷ Case C-379/98 *PreussenElektra v Schleswig* [2001] ECR I-2099, Opinion of Advocate-General Jacobs (26 October 2000) [231].

It is in the CFI decision of *Sweden v Commission* that such extensive legal obligations are demonstrated.¹¹⁸ This case was a legality challenge to the Commission's decision to include a weedkiller substance – paraquat – in the list of approved plant protection products on the market under Directive 91/414 ('Plant Protection Product Directive').¹¹⁹ Sweden claimed that the decision breached the integration principle, as well as the precautionary principle and the principle that 'a high level of protection should be ensured'.¹²⁰ The CFI accepted these arguments. The reasoning of the Court is quite technical, turning on scientific evidence that demonstrated compelling environmental and health risks associated with paraquat, which informed the Court's finding that these environmental principles were infringed. However, this was a case in which the Commission did *not* purport to act on the basis of any environmental principle and yet these environmental principles were employed doctrinally to review its action. On one view, this is a case in which the integration principle is used to expand the scope of 'EU environmental competence' (to EU agricultural policy), so as to give other environmental principles (here the precautionary principle and principle of a high level of protection) doctrinal roles across a wider range of cases, in terms of subject-matter and policy competence. It is thus a remarkable case as it indicates that such expansion may occur to cover any area, or all areas, of EU policy competence, giving environmental principles wide-ranging legal roles in EU law.

¹¹⁸ Case T-229/04 *Sweden v Commission* (ECJ 11 July 2007).

¹¹⁹ Council Directive 91/414/EC concerning the placing of plant protection products on the market [1991] OJ L 230/1.

¹²⁰ This so-called 'principle' is another EU environmental principle that demonstrates the porous grouping of environmental principles in EU law. It derives from Article 191(2) TFEU ('Union policy on the environment shall aim at a high level of protection'), as well as references throughout the Treaty to a 'high level of protection' in various policy areas (above n50) but its description as a principle is inconsistent (L Krämer, *EC Environmental Law* (6th edn, Sweet & Maxwell, London 2007) 12-13; cf Jans and Vedder, *European Environmental Law* (n8) 36-37). Its doctrinal treatment as an environmental 'principle' in this case includes it within the group of legally relevant EU environmental principles for the purpose of this mapping exercise.

It is also a remarkable case because the integration principle itself is not simply a linking and expanding principle in this case but, in doctrinal terms, it constitutes an explicit and separate ground for testing the lawfulness of the Commission decision. Unfortunately, the detailed reasoning of the CFI in arriving at this conclusion is obscure. Much of the reasoning focuses on the precautionary principle, and the case can also be viewed as an interpretive case, since the precautionary principle is applied to interpret provisions of the relevant Directive to determine a breach of that principle.¹²¹ Its reasoning on the breach of the integration principle appears largely to rely on finding that other environmental principles have been infringed. However, in this case the independent doctrinal roles of all three environmental principles are explicitly articulated by the Court – the nature of the legal argument is thus different from most EU cases in which environmental principles have doctrinal roles.¹²² While this is an outlying case, it reflects a trend, throughout the case law mapped in this Chapter, that the integration principle expands the scope of the EU law map on which environmental principles have ever more influential doctrinal roles. Thus environmental principles not only have unique legal roles in EU law, but these roles are in a state of evolution.

6 Conclusion

This Section has demonstrated that there are limits to the doctrinal roles taken on environmental principles in EU law. The scope of EU environmental competence, and the proper role of the EU courts in interfering with EU and Member State institutional

¹²¹ Below, text accompanying nn165-170.

¹²² In particular, while this case in some ways resembles informing legal review test cases in Section F(2) below, such as *Pfizer* (n29) and Case T-392/02 *Solvay Pharmaceuticals BV v Council* [2004] ECR II-4555, where Commission decisions were challenged for breach of the precautionary principle, it is distinct in that in this case the Court isolates environmental principles as standards which can be breached: cf *ibid* [120].

discretion, constrains legal arguments that might be made on the basis of environmental principles. In particular, the EU courts cannot generally compel the taking of any particular environmental action on the basis of environmental principles, where the EU institutions have not first acted to exercise their competence.

As a result, environmental principles do *not* operate as prescriptive legal solutions to environmental problems, in the manner hoped by some scholars and outlined in Chapter 2,¹²³ in this EU legal context. Further, environmental principles do not have pervasive and independent legal roles across EU law. Thus, rather than *cohering* EU environmental law, they signify both its competence-bounded reach, as well as its (suggested) incremental expansion by virtue of the integration principle. Environmental principles also have a prominent role in guiding the policy discretion of EU and Member State institutions, which is often outside the preserve of legal control. Scholarly hopes with respect to environmental principles as legal concepts are thus either negated, or incorrectly focused, within EU law, considering its developing doctrine, institutional constraints and particular legal culture.

E INTERPRETIVE CASES

This second treatment category comprises cases in which EU courts interpret the EU Treaties or secondary EU legislation and rely on environmental principles to elucidate the meaning of ambiguous provisions.¹²⁴ The EU courts (primarily the ECJ) adopt the judicial technique of teleological interpretation in these cases, relying on the principles to

¹²³ Chapter 2(B)(3).

¹²⁴ These are primarily referred by Member State courts under Article 267, but also include Article 258 and 263 proceedings in which issues of interpretation arise.

inform the purposive inquiry thereby undertaken, so introducing a doctrinal role for environmental principles in resolving questions of legal interpretation.

In these cases, the EU institutions have first exercised their EU environmental competence to legislate, or to act under a particular Treaty provision, on the basis of environmental principles and that exercise of competence is then legally constrained by environmental principles through their interpretive influence. In this way, environmental principles define the *nature* of EU environmental competence exercised by EU institutions. However, because environmental principles are so general in their formulation, such ‘definition’ of competence also involves the marginal definition of environmental principles themselves in each interpretive context – the way in which environmental principles are employed by the courts to elucidate ambiguous provisions gives insight into the meaning of these principles, without constituting universal definitions for them.

The interpretive cases fall into two groups. First, this Section considers cases in which the ECJ interprets ambiguous EU legislation enacted under Title XX TFEU. These cases concern institutional acts of EU environmental competence in a narrow sense. Second, this Section considers interpretive cases in which the scope of EU environmental competence is extended by virtue of the integration principle, giving environmental principles a wider doctrinal role in construing Treaty provisions and EU legislation, concerning public health, agriculture, competition and transport policy. In these cases, the interpretive roles of environmental principles are limited to cases where this expanded competence has been exercised on the basis of environmental principles, or where this competence *should* have been so exercised. In the latter sense, environmental principles have the most radical doctrinal roles in this treatment category, constituting outlying

cases that suggest the future direction in which legal roles of environmental principles in EU law might develop.¹²⁵

1 Interpreting EU Environmental Competence in a Narrow Sense: Environmental Principles as Legally Binding Principles of EU Policy under Title XX TFEU

The interpretive cases that concern exercises of EU environmental competence under Title XX TFEU involve the construction of a group of EU environmental directives: the Waste Directive,¹²⁶ Landfill Directive,¹²⁷ Habitats Directive¹²⁸ and Urban Waste Water Treatment Directive,¹²⁹ and the Environmental Liability Directive.¹³⁰ All these directives are either based on, or have specific provisions that give concrete expression to, environmental principles. It is notable that these particular directives, as opposed to other environmental directives with ambiguous provisions that have come before the courts for interpretation,¹³¹ have been interpreted in light of environmental principles. If environmental principles are hoped to unify environmental law,¹³² the selective use of environmental principles as interpretive aids indicates that this hope is either misplaced or

¹²⁵ Reflecting the impact of the integration principle on the boundaries of policy cases: above Section D(6).

¹²⁶ Council & Parliament Directive (EC) 2008/98 on waste and repealing certain Directives [2008] L312/3, Recital 30 ('Waste Directive 2008'), replacing previous Council Directive (EC) 91/156 amending Directive 75/442 on waste [1991] OJ L78/32 ('Old Waste Directive'). See Joined Cases C-175/98 and C-177/98 *Lirussi and Bizzaro* [1999] ECR I-6881.

¹²⁷ Landfill Directive (n75).

¹²⁸ Council Directive (EC) 92/43 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 ('Habitats Directive').

¹²⁹ Council Directive (EC) 91/271 concerning urban waste-water treatment [1991] OJ L135/40. See Case C-280/02 *Commission v France* [2004] ECR I-8573; cf Case C-119/02 *Commission v Greece* [2004] OJ 201/2.

¹³⁰ Council & Parliament Directive (EC) 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 ('ELD').

¹³¹ Cf Council Directive (EC) 85/337 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40, Art 2(1).

¹³² Chapter 2(B)(4)(a)-(b).

yet to be realised in EU environmental law. In these interpretive cases, the TFEU's legal prescription that EU environmental policy *shall be based* on the four environmental principles in Article 191(2) is reflected in these environmental principles' having doctrinal roles as interpretive aids.

A large body of these interpretive cases concerns the definition of 'waste' in the Waste Directive.¹³³ There has been much litigation about the definition of waste, because it is undefined in the Directive yet it is the central concept that triggers regulatory consequences that follow under the Directive.¹³⁴ In *ARCO*,¹³⁵ the ECJ concluded from the fact that Community policy on the environment, under Article 191(2) (ex-Article 174(2)), 'is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken', that the definition of 'waste' in the Directive should not be interpreted restrictively.¹³⁶ In reaching this interpretive conclusion, the ECJ thus relied explicitly on the interpretive influence of the preventive and precautionary principles, giving these principles doctrinal roles. It is, however, far from clear that either principle should have led to this interpretive outcome. Both principles have open and not obviously overlapping meanings.¹³⁷ And it is not obvious that the idea of either preventing waste, or avoiding uncertain risks that might be associated with it, leads to a broad definition of waste, which may in fact discourage efforts to develop innovative production processes that

¹³³ Waste Directive 2008, Art 3(1).

¹³⁴ E Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19(3) JEL 367, 374-376.

¹³⁵ Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475.

¹³⁶ *Ibid* [36]-[40].

¹³⁷ Chapter 3, n91.

maximise the use of resources and thereby prevent waste.¹³⁸ However, the ECJ's conclusion, despite its lack of explanation, demonstrates what these general environmental principles mean legally *in this particular regulatory context*. In a line of cases following *ARCO*, the ECJ has repeatedly adopted this same interpretive reasoning.¹³⁹

A recent spate of cases has involved the polluter pays principle being used as an interpretive aid. These cases are remarkable in demonstrating the flexibility of this principle.¹⁴⁰ Not only does the principle manifest in different marginal definitions, as applied to interpret the Waste Directive, Landfill Directive, and Environmental Liability Directive respectively, but its precise manner of implementation as a scheme of cost allocation for pollution under those directives leaves Member States a wide margin of discretion, which depends on local conditions.¹⁴¹ At the same time, the Court also makes general statements about the nature and meaning of the polluter pays principle, which resonate across the different environmental regulatory contexts with which these various Directives are concerned. Thus the ECJ clarifies, over a series of cases, that the polluter pays principle applies only to impose on polluters the burden of remedying pollution to

¹³⁸ Scotford, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (n134).

¹³⁹ Case C-9/00 *Palin Granit Oy* [2002] ECR I-3533; Case C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-8725; Case C-457/02 *Criminal Proceedings against Niselli* [2004] ECR I-10853; Case C-235/02 *Criminal Proceedings against Saetti and Frediani* [2004] ECR I-1005; Case C-1/03 *Criminal Proceedings against Van de Walle* [2004] ECR I-7613; Case C-176/05 *KVZ retec v Republik Österreich* [2007] Env LR D14.

¹⁴⁰ The Opinions of the Advocates-General in these cases go beyond simply using the polluter pays principle as an interpretive aid to discussing the legal role of the principle in more complex ways: eg above n32. Also, in *ERG*, Advocate-General Kokott goes further than the ECJ in using the polluter pays principle to interpret the *ELD*, examining how Member States might take more stringent measures under the Directive in accordance with the polluter pays principle: *ERG*, *Opinion of Advocate-General Kokott* (n87), [96]-[115].

¹⁴¹ Case C-254/08 *Futura Immobiliare srl Hotel Futura v Comune di Casoria* [2009] 3 CMLR 45 [48], [55]; *ERG* (n87) [55]. Such national implementation of the polluter pays principle would be open to review under EU law not as an infringement of the polluter pays principle, but as an infringement of the principle of proportionality: *Futura* [56]; also *Standley* (n32) [52].

which they have *contributed*.¹⁴² These general statements about the polluter pays principle give it doctrinal continuity across the Court's case law and inform its evolving interpretive role, giving the principle increasing doctrinal depth in EU law over time.

However, how the general element of 'contribution' by a polluter is identified varies across the cases, in light of different legislative expressions of the polluter pays principle, giving rise to marginal definitions of the principle. Thus in *Commune de Mesquer*,¹⁴³ the ECJ used the polluter pays principle to interpret Article 15 of the previous Waste Directive, which mentioned this principle explicitly,¹⁴⁴ providing, inter alia, that 'producers' of products that become waste are responsible for bearing the cost of disposing of waste, 'in accordance with the polluter pays principle'. In this case, the interpretive issue for the ECJ was the meaning of a 'producer'. The ECJ found, 'in accordance with the "polluter pays" principle', that a producer will only fall within the Article 15 obligation if 'he has *contributed* by his conduct to the risk that the pollution caused [by the waste] will occur'.¹⁴⁵ In this case, such conduct included that of the seller of hydrocarbons in chartering a ship to transport the oil, particularly if he failed to take measures to prevent the incident of a shipwreck that would cause pollution of the sea (for example, by choice of ship).¹⁴⁶

¹⁴² Case C-188/07 *Commune de Mesquer v Total France SA and Total International Ltd* [2008] 3 CMLR 16 [77]; *Futura* (n141) [45]; *ERG* (n87) [57], [67].

¹⁴³ *Commune de Mesquer* (n142).

¹⁴⁴ Old Waste Directive, Art 15.

¹⁴⁵ *Commune de Mesquer* (n142) [82] (emphasis added). In *Futura Immobiliare*, the ECJ interpreted the same provision of the Waste Directive using the polluter pays principle as an interpretive aid in quite different circumstances – concerning the cost allocation mechanism for the collection of urban waste by national authorities – giving rise to a different marginal definition of the principle: *Futura* (n141) [50]-[52].

¹⁴⁶ *Futura* (n141).

By contrast, in *ERG*,¹⁴⁷ the ECJ is concerned with interpreting a different expression of the polluter pays principle – various Articles of the Environmental Liability Directive, which is in general an expression of the principle.¹⁴⁸ In this case, the Court employs the polluter pays principle doctrinally to find that the causal link required under the Directive between a relevant activity and pollution, in order to establish liability, can be presumed if the responsible national authority has ‘plausible evidence’ capable of justifying the presumption (such as the fact that an installation is located close to pollution and there is a correlation between the substances used and emitted by the installation and the pollution).¹⁴⁹ This is a different aspect of how a polluter might ‘contribute’ to pollution within the interpretive scope of the polluter pays principle, and it ascribes a different marginal definition to the principle.¹⁵⁰

In another line of cases, concerning the interpretation of Article 6(3) of the Habitats Directive, the ECJ has relied on the precautionary principle as an interpretive aid, revealing some precision about its content in this different EU interpretive context.¹⁵¹ The Court finds that, with respect to uncertain environmental risks, the precautionary principle dictates that the protective measures of the Directive should apply where environmental risks cannot be excluded. In relation to this particular regulatory scheme, the precautionary principle requires erring on the side of caution, and the Directive is interpreted accordingly. In these cases, the precise issue for the ECJ is when a plan or

¹⁴⁷ *ERG* (n87).

¹⁴⁸ *ELD*, Articles 1, 6 & 8(1). The *ELD* ‘seeks to implement the “polluter pays” principle in a certain form’: *ERG*, *Opinion of Advocate-General Kokott* (n87) [94].

¹⁴⁹ *ERG* (n87) [57].

¹⁵⁰ For another regulatory context in which the polluter pays principle is used doctrinally as an interpretive aid, reflecting again differently how polluters must make good the costs of pollution to which they contribute, see Case C-172/08 *Pontina Ambiente Srl v Regione Lazio* [2010] 3 CMLR 1.

¹⁵¹ *Waddenzee* (n72); Case C-6/04 *Commission v UK (Conformity)* [2005] ECR I-9017; Case C-98/03 *Commission v Germany* [2006] ECR I-53.

project is ‘likely to have a significant effect’ on a special area of conservation, thereby triggering the requirement for an ‘appropriate assessment’ to be carried out. The Court concludes:¹⁵²

‘In the light... of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment [under Article 191(2) TFEU], and by reference to which the Habitats Directive must be interpreted, such a risk [ie likelihood] exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned.’

In this way, the precautionary principle, with its content in this EC environmental context clarified, operates doctrinally to determine the issue of interpretation referred to the ECJ.¹⁵³

2 Interpreting EU Environmental Competence More Broadly: Environmental Principles beyond Title XX TFEU

Environmental principles are also used as interpretive aids in cases involving ambiguous Treaty provisions and EU legislation beyond Title XX TFEU. These cases involve legislative or administrative acts by EU institutions in an expanded area of EU environmental competence, which is based on, and thus legally guided by, environmental principles. The Court finds that these acts exercising broader EU environmental competence are based on environmental principles, either by presuming this is the case, or effectively finding that it *should* be so. In the latter sense, environmental principles

¹⁵² *Waddenzee* (n72) [44]. Cf the second part of the construction exercise undertaken by the ECJ with respect to Article 6(3) of the Habitats Directive, which the Court resolved by a close reading of the Directive itself. For this, resort to the precautionary principle was found to be unnecessary; there was no ambiguity that needed purposive resolution.

¹⁵³ For another example of how the Habitats Directive might be interpreted by drawing on an environmental principle – the sustainable development principle – see *First Corporate Shipping, Opinion of Advocate-General Leger* (n59).

have their most far-reaching legal roles. However there are limits to the interpretive roles of environmental principles in relation to EU acts: environmental principles will have no interpretive roles where the relevant ambiguous provision is found by the Court not to be based on environmental principles, as seen in some policy cases above.¹⁵⁴ The interpretive cases involving environmental principles in relation to EU legislation beyond Title XX fall into two sub-groups: those involving the precautionary principle and areas of EU competence guided by a ‘high level of protection’; and cases in which the integration principle drives the interpretive role of environmental principles even further into other areas of EU competence.

(a) EU Environmental Competence linked by a ‘High Level of Protection’:

Interpretive Role for the Precautionary Principle

First, there are cases in which EU environmental competence extends into other areas of competence in which a ‘high level of protection’ is required by the Treaty or secondary legislation (health, the internal market, agriculture), and the precautionary principle is employed doctrinally to resolve an interpretive issue. Since *Artegodan*, the European courts have accepted that the precautionary principle is a ‘general principle’ that applies to guide and inform EU policy across such areas, expanding the area of competence in which this principle has a legal role, by virtue of the integration principle and sometimes so-called ‘principle of a high level of protection’.¹⁵⁵ As a result, interpretive roles for the precautionary principle across these different areas of EU competence show that there is no clear demarcation of ‘environmental’ issues in EU law.¹⁵⁶ Rather, environmental

¹⁵⁴ Above, Section D(3).

¹⁵⁵ Above n120.

¹⁵⁶ Above n12.

protection concerns are interconnected with other policy areas and the widening doctrinal role of the precautionary principle examined in this sub-Section (as well as of other environmental principles examined in sub-Section (b) below) demonstrates how these points of policy overlap manifest legally.

Thus, in *Monsanto*, discussed above,¹⁵⁷ the ECJ deflected most of the arguments based on the precautionary principle, but observed that the precautionary principle was given expression in the safeguard clause (Article 12) of the novel food GMO Regulation. This Regulation is an internal market measure based on Article 114 TFEU (ex-Article 95 EC), which is thus required to take as its base a ‘high level of protection’ to the extent that it concerns environmental protection or health.¹⁵⁸ The Court finds that ‘the conditions for the application of [the safeguard] clause must be interpreted having due regard to [the precautionary] principle’.¹⁵⁹ Relying on previous case law, the ECJ asserts that it follows from the precautionary principle that ‘where there is uncertainty as to the existence or extent of risks to human health, protective measures *may* be taken without having to wait until the reality and seriousness of those risks become fully apparent’.¹⁶⁰ Thus a Member State may take protective measures under Article 12 even if a full risk assessment cannot be carried out because of inadequate available scientific data. The ECJ has identified the relevant content of the precautionary principle, and used it to influence the interpretive outcome.

The Court goes on to expand on the content of the precautionary principle, asserting that, despite inadequate scientific data, there must be ‘specific evidence

¹⁵⁷ *Monsanto* (n5), above, text accompanying nn97-98.

¹⁵⁸ Ex-Article 95(3) EC.

¹⁵⁹ *Monsanto* (n5) [110].

¹⁶⁰ *Ibid* [111].

which... makes it possible reasonably to conclude on the basis of the most reliable scientific evidence available... that the implementation of those measures is necessary in order to avoid... potential risks...'.¹⁶¹ The requirement of reliable scientific evidence in cases of scientific uncertainty is for now noted as further informing the content of the principle in this case,¹⁶² giving it an apparently different identity from that isolated in *Waddenzee* above.¹⁶³ This difference, or conflict, can be explained by appreciating that the courts are defining the principles marginally with respect to different legal questions in different EU regulatory contexts so that, the resulting definitional picture thus appears confused.¹⁶⁴ Legal definitions of environmental principles are the end points rather than starting points of their legal analysis, and they may constitute a variety of end points. It is their doctrinal treatment by courts that isolates the legal roles of environmental principles.

Another definitional end-point of the precautionary principle is seen in *Sweden v Commission*, also discussed above,¹⁶⁵ a case in which the principle is employed by the CFI to interpret an EU legislative framework outside the environmental title. In this case, the relevant legislation was the assessment framework for approving pesticides for use within the EU under the Plant Protection Product Directive, adopted on the basis of the common agricultural policy in ex-Title II of the EC Treaty. While this Title contains no

¹⁶¹ Ibid (n5) [113]. For another case where the Court uses the precautionary principle to interpret a provision of public health directive, requiring a comprehensive assessment of the health risk based on the most reliable scientific data available before a Member State can rely on the principle, see Case C-446/08 *Solgar Vitamin's France v Ministre de l'Économie, des Finances et de l'Emploi* (ECJ 29 April 2010) [69]-[70].

¹⁶² This theme of adequate scientific information is addressed further below in Section F(2)(b)-(c),(e).

¹⁶³ Above n152.

¹⁶⁴ Arguably, the difference lies in the nature of the legal issue; in environmental cases such as *Waddenzee* (n72), the Court needed to determine when environmental protective measures should apply (ie when they are *required* to apply), whereas, in this case, the concern is when a Member State is allowed to rely on the safeguard clause (ie when it *may* do so).

¹⁶⁵ Above, text accompanying nn119-122.

reference to environmental protection or a high level of protection, the Directive does,¹⁶⁶ particularly in its requirement that no pesticides be approved unless they have no harmful effects on human or animal health or groundwater or any unacceptable influence on the environment.¹⁶⁷ In interpreting this requirement the CFI used the precautionary principle to find that a substance may be refused approval if there is ‘*solid* evidence [which] may reasonably raise doubts as to [its] safety’, but not if there are only hypothetical risks.¹⁶⁸ This echoes the ECJ’s elaboration of the principle in *Monsanto*, but the CFI also goes on to find that the possibility of placing restrictions on the use of pesticides under the Directive, as interpreted by the precautionary principle, means that a substance may only be approved if it is established ‘beyond a reasonable doubt’ that restrictions on use make it possible to ‘ensure’ that its use will not have harmful health or environmental effects.¹⁶⁹ This is a stricter aspect of the precautionary principle, highlighting again its marginal definition in this different regulatory context.¹⁷⁰

(b) EU Environmental Competence Extended Further: Interpretive Roles for and due to the Integration Principle

There are other cases in which the integration principle is used to extend the interpretive roles of environmental principles even further, so that they inform the meaning of ambiguous provisions in areas of policy where there is no clear Treaty mandate or legislative direction for a ‘high level of protection’, only the overarching environmental

¹⁶⁶ Plant Protection Product Directive (n119), Recital 9 (‘high standard of protection’ in relation to environmental, human and animal health).

¹⁶⁷ Plant Protection Product Directive (n119) Article 5(1).

¹⁶⁸ *Sweden v Commission* (n118) [161].

¹⁶⁹ *Ibid* [170].

¹⁷⁰ For a case in which the precautionary principle has a similar interpretive role, see *Solvay* (n122) [121], in which the principle informs EC authorisation provisions under Directive 70/524 on additives to feeding stuffs [1970] OJ Eng Spec Ed (III) 840: [122]-[123]. The principle is defined differently in light of the different regulatory context: *ibid*, [148]-[149].

protection requirements of Article 11 TFEU itself. This is seen particularly in public procurement and state aid cases, where the integration principle is used directly as an interpretive aid, or as a linking device to employ other environmental principles to interpret provisions in an expanded scope of EU environmental competence.

An example where the integration principle is directly used to interpret an ambiguous provision is found in *Concordia Bus Finland*,¹⁷¹ concerning Article 36(1)(a) of Directive 92/50,¹⁷² which sets out criteria on which a national contracting authority may award a public service contract. The ECJ finds, in light of the integration principle, that Article 36(1)(a) does not exclude the possibility of a contracting authority using *other* criteria relating to environmental protection when assessing the ‘economically most advantageous’ tender under the Directive.¹⁷³

An example of a case in which the integration principle was used as a linking principle is in the Opinion of Advocate-General Jacobs in *GEMO*,¹⁷⁴ which is the first of a group of state aid cases in which environmental principles are employed doctrinally to interpret Article 107 TFEU (ex-Article 87(1) EC) (prohibiting state aids that distort or threaten to distort competition). In this case, the Advocate-General found that a French law establishing a compulsory and free public service for the collection and disposal of animal slaughterhouse waste constituted a state aid because the waste constituted an economic burden that would normally, in accordance with the polluter pays principle, have to be borne by slaughterhouses. Advocate-General Jacobs justified his use of the

¹⁷¹ Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin Kaupunki and HKL-Bussiliikenne* [2002] ECR I-7213.

¹⁷² Council Directive 92/50/EC relating to the co-ordination of procedures for the award of public service contracts [1992] OJ L209/1.

¹⁷³ *Concordia* (n171) [57].

¹⁷⁴ Case C-126/01 *Ministre de l'Économie, des Finances et de l'Industrie v GEMO* [2004] 1 CMLR 9, Opinion of Advocate-General Jacobs (30 April 2002).

polluter pays principle as an ‘analytical tool’ to resolve this issue of competition law by appealing to the integration principle.¹⁷⁵

There have since followed two radical state aid cases, in which the CFI has used the integration principle doctrinally to interpret ex-Article 87(1) EC to find that a national environmental tax and an emission trading scheme were not state aids.¹⁷⁶ In light of the integration principle, the environmental objectives of the schemes altered how the Court determined that the Commission should interpret and apply the Treaty’s state aid rules. The ECJ has overruled the reasoning and decision in one of these cases,¹⁷⁷ and the second is on appeal,¹⁷⁸ suggesting that this judicial expansion of the scope of EU environmental competence in which environmental principles have doctrinal roles is either misplaced or still evolving.¹⁷⁹

3 Conclusion

In this Section, environmental principles have been used doctrinally by the EU courts to interpret ambiguous provisions of EU legislation based on the environmental title of the Treaty, as well as EU legislation and Treaty provisions beyond that discrete area of EU competence. Environmental principles have doctrinal roles in these cases in that they act as reasons that influence the outcomes of legal issues of interpretation, purposively guiding the courts’ interpretation. In the second category of cases considered in this

¹⁷⁵ Ibid.

¹⁷⁶ Case T-210/02 *British Aggregates Association v Commission* [2007] Env LR 11 ; Case T-233/04 *Netherlands v Commission* [2008] Env LR 42 .

¹⁷⁷ Case C-487/06 P *British Aggregates Association v Commission* [2009] 2 CMLR 10 [79]-[92].

¹⁷⁸ Case C-279/08 P *Commission v Netherlands* (ECJ 8 May 2009).

¹⁷⁹ For discussion as to the interpretive limits of the integration principle in relation to internal market measures: Case C-246/99 *Commission v Denmark* [2002] ECR I-6943, Opinion of Advocate-General Colomer (13 September 2001)

Section, the case law of the EU courts reveals how environmental considerations infiltrate areas of EU competence beyond the environmental title, expanding the area of EU environmental competence in which environmental principles have legal roles once the EU institutions have acted. This aspect of the doctrinal picture of environmental principles is due to the integration principle, demonstrating a different legal dimension for that principle in EU law. The interpretive cases in this Section also give rise to marginal definitions for environmental principles in different regulatory contexts. This is because, in employing environmental principles doctrinally, the courts need to substantiate them to some extent. This is a trend that develops in the next treatment category as well.

In sum, the interpretive cases in this Section display a particular technique of judicial reasoning but they do not create definitive, universal legal meanings for environmental principles. Nor do they compel particular actions by institutions to solve environmental problems, although they do restrict permissible lines of administrative decision-making, particularly on the stricter manifestations of the precautionary principle seen in cases such as *Waddenzee* and *Sweden v Commission*. Nor do environmental principles, in their interpretive guise, solve perceived legal problems in environmental law. They do not unify EU environmental law since they are not used with respect to *all* EU environmental legislation. In addition, their use within an expanded area of EU environmental competence, which overlaps with other policy areas, shows that EU environmental law is not a discrete area of law that requires coherence, but an evolving and disparate legal area.

It might be argued that environmental principles in this treatment category look like Dworkinian ‘legal principles’, in that they guide judicial reasoning in a particular direction without mandating a particular outcome.¹⁸⁰ On a very general level, this is an accurate description of these cases, but it does not account for the fact that the same environmental principles might point in quite different directions, depending on the regulatory context; nor for the more complex role played by the integration principle in these cases; nor for the fact that the EU courts use environmental principles interpretively only when they determine that EU institutions (should) have first acted on the basis of the principles, reinforcing that environmental principles are intertwined with the exercise of institutional competence in the EU context. The legal roles played by environmental principles in this sense are a unique manifestation of EU legal culture, reflecting the teleological reasoning style of the EU courts, the regulatory frameworks which they consider (as well as the Treaty context within which these frameworks are devised), and the particular legal questions considered by the courts.

F INFORMING LEGAL TEST CASES: REVIEWING THE BOUNDARIES AND EXERCISE OF EU ENVIRONMENTAL COMPETENCE

In this third treatment category, environmental principles are given doctrinal roles in informing legal review tests. The cases in this category involve EU and Member State institutions having acted on the basis of environmental principles within the scope of EU environmental competence to introduce legislative measures or administrative regimes, with this action then being questioned for its legality under EU law. The primary issue in

¹⁸⁰ Chapter 2, text accompanying nn67-68.

these cases is the extent of discretionary power afforded to these institutions to adopt policy and make decisions on the basis of environmental principles, rather than any particular line of policy that *should* be adopted by them.

Since, in the TFEU, environmental principles legally prescribe the limits of the policy discretion exercised by EU (and Member State)¹⁸¹ institutions within the scope of EU environmental competence, they are employed by the courts to inform the tests applied in determining whether those institutions have overstepped the bounds of their policy authority, thereby taking on doctrinal roles. The nature of the legal inquiry in such review is complicated since the courts have a duty to police the legality of exercises of discretion,¹⁸² but they also need to allow decisions to be made. This balance is reflected in a careful constitutional path trodden by the EU courts in reviewing the legality of EU and Member State institutional decision-making. The delicacy of this balancing exercise often translates into messiness in the treatment of environmental principles in this treatment category, since they form the basis for the exercise of policy discretion, but also for legally testing its bounds. Thus the courts use the principles to inform, and also to generate, legal tests applied to review discretion in these cases, but *also* as the basis for deferring to the policy decisions of the Community institutions (and of the Member States in unharmonised domains) within the limits of permissible policy identified by the courts. This dual role of the principles, as directing legal outcomes but preserving policy discretion, features in several cases in this treatment category, particularly in Section F(2) below.

¹⁸¹ Below, Section F(2)(e).

¹⁸² Arts 220, 230 EC.

In using environmental principles to inform various tests of review in this treatment category, the EU courts again often give marginal definitions to the principles. Their general formulation requires this in order that environmental principles have a relevantly informative role. However, the courts have gone a step further than giving environmental principles marginal definitions, elaborating the precautionary principle to the point of generating a new test of review – a test of adequate scientific evidence – which now (in various guises) appears in much of the EU case law in this treatment category involving the precautionary principle. However, this review test is used in a supplementary manner, so that its determination is used to inform the relevant primary review tests being applied by the Court.

The cases in this Section fall into two groups: those concerned with the *boundaries* of EU environmental competence as exercised by and between EU institutions, and those concerned with the lawful *exercise* of discretion within the scope of EU environmental competence, by both EU and Member State institutions. In both cases, environmental principles are used to inform review tests that have been developed as doctrine by the EU courts in relation to the particular legal question involved, and which are relatively open in their formulation, leaving scope for environmental principles to inform their application.

1 Legal Basis Cases

In this sub-category of cases, environmental principles are employed by the ECJ to inform legal tests in resolving disputes between the EU institutions over the correct legal

basis for *Community* measures.¹⁸³ These are disputes about the legality of EC measures on the ground of ‘lack of competence’ in Article 263 TFEU. Arguments about lack of competence are arguments about the proper boundaries of EU (previously EC) law-making, where those boundaries are determined by the relevant legal basis for legislating set out in the Treaty. A measure must be properly based on a Treaty provision and title, and introduced in accordance with its prescribed legislative method, for the relevant EU legislative institutions to have had acted within their competence. This ground of review is not further elaborated in the Treaty, and the ECJ has developed tests for deciding whether an EU (or EC) measure is properly based, which involve isolating the predominant aim and content of a measure to determine its centre of gravity.¹⁸⁴ It is this legal ground of review and the Court’s associated tests that environmental principles are used to inform in these cases.¹⁸⁵

Environmental principles inform legal basis tests in three ways in EU cases. First, they are used doctrinally to identify when EU environmental competence has been validly exercised under Title XX TFEU. Thus in *Commission v Council (Waste Directive)*, the ECJ considered whether the Waste Directive¹⁸⁶ was properly adopted on the basis of

¹⁸³ All these cases were decided under the pre-Lisbon Treaty structure, which distinguished EC from EU measures by its three different pillars of competence.

¹⁸⁴ Above n27. For doctrinal developments/complexity in relation to these tests, see Chalmers, Davies and Monti, *European Union Law* (n33) 95-8.

¹⁸⁵ The jurisprudence of these cases is now out of date in that the legislative procedure under the environmental title is now equivalent to that under the internal market basis of competence – the ‘ordinary legislative procedure’ under the TFEU, previously the ‘co-decision’ procedure, with the exception of legislation under Article 192(2) – so that there is no longer the same competition for institutional influence along this dividing line of legal basis. The abolition of the pillar structure with the Lisbon Treaty also means that the institutional tension in relation to decision-making across different pillars is no longer. However, questions of legal basis remain relevant under the new Treaty structure and the doctrinal use of environmental principles in this general sense remains relevant in EU law.

¹⁸⁶ Old Waste Directive.

Article 192 TFEU (ex-Article 130s EC).¹⁸⁷ In finding that it was properly adopted on that basis, the ECJ looked to the aim and content of the measure,¹⁸⁸ finding that its aim was to implement the principle of rectification at source,¹⁸⁹ and that its content included, inter alia, a ‘confirmation’ of the polluter pays principle in Article 15.¹⁹⁰ In this way, environmental principles were observed as the legislative policy underlying the contested Directive, and employed to inform the relevant legal test through purposive reasoning.

A contentious case in which the integration principle was used to inform a Title XX legal basis decision is *Commission v Council (Environmental Crime)*,¹⁹¹ in which the ECJ found that the Community had competence to adopt legislative provisions establishing environmental offences, despite the general exclusion of criminal law and procedure from EC competence. This is because environmental protection was a ‘fundamental’ objective of the Community, as emphasised by the integration principle.¹⁹² Here the integration principle was used to inform the aim and content tests indirectly by giving extra weight to the environmental protection aim and content of the contested measure, thereby justifying the radical reasoning in this case. The integration principle served to expand EC environmental competence under Title XX.

The second type of legal basis case in which environmental principles have doctrinal roles involves the expansion of EU environmental competence beyond Title XX. There is a line of cases in which the integration principle has been used as a reason why a contested measure is *not* properly based on Article 192 TFEU, because that

¹⁸⁷ Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939. See also Case C-187/93 *Parliament v Council (Waste Regulation)* [1994] ECR I-2857 [20].

¹⁸⁸ *Waste Directive Case* (n187) [7].

¹⁸⁹ *Ibid* [13]-[14].

¹⁹⁰ *Ibid* [9].

¹⁹¹ *Environmental Crime* (n78).

¹⁹² *Ibid* [42].

principle cannot be used to create a bias that a measure has an environmental aim and content whenever it serves environmental protection objectives.¹⁹³ On the contrary, the integration principle indicates that environmental objectives may, and should, feature in EU measures enacted on the full range of legal bases in the Treaty (including, in various cases, transport policy, regulation of the internal market, and EC common commercial policy). It is only when the environmental protection objective of a measure is predominant that it will be properly based on Title XX.¹⁹⁴ In these cases, the integration principle limits any environmental bias that might inform tests of legal basis. This qualifies the conclusion in the *Environmental Crime case*, and indicates that EU environmental competence, beyond Title XX, overlaps with other areas of EU policy, creating blurred competence boundaries. This overlapping and extended competence reflects the thread, in the Sections on policy and interpretive cases above, of the integration principle expanding, or potentially expanding, the doctrinal roles of environmental principles.¹⁹⁵

The third case in which an environmental principle informs a legal basis test is in fact an outlying case concerning the sustainable development principle – *Commission v Council (Small Weapons)*.¹⁹⁶ This case does not involve the boundaries of EU environmental competence; rather it concerns the boundaries of Community competence more generally.¹⁹⁷ The contested EU measures in this case were aimed at reducing the accumulation and spread of small arms and light weapons in West African States, and the

¹⁹³ Case C-62/88 *Hellenic Republic v Council (Chernobyl I)* [1990] ECR I-1527 [20]; *Titanium Dioxide* (n27) [22]; Case C-440/05 *Commission v Council (Ship-Source Pollution)* [2008] 1 CMLR 22 [60].

¹⁹⁴ Case C-411/06 *Commission v Parliament and Council (Waste Shipment Regulation)* (ECJ 8 September 2009), Opinion of Advocate-General Maduro (26 March 2009) [17].

¹⁹⁵ Above, Sections D(5)&E(2).

¹⁹⁶ *Small Weapons Case* (n63)

¹⁹⁷ And is, to that extent, out-of-date, as in *Environmental Crime* (n78) above.

question for the ECJ was whether these measures could have been based on Article 209 TFEU (ex-Article 179 EC), within the Community's Development Cooperation Policy ('DCP'), or were properly introduced outside the scope of Community competence under the former Common Foreign and Security Policy pillar.¹⁹⁸ The ECJ found that the aim and content of the contested measures were intimately connected with, *inter alia*, sustainable development, a central objective of the Community's DCP, and so were properly within the scope of Community competence. However, the Advocate-General, following a similar line of reasoning, reached the opposite conclusion, attributing a narrower meaning to sustainable development, thereby limiting its doctrinal influence. By adopting a broad definition of sustainable development – so that the aim to reduce small arms and light weapons was found to be concerned with promoting peace and security and the prospect for sustainable development¹⁹⁹ – the ECJ expanded the scope of Community competence. Advocate-General Mengozzi, by contrast, adopted a narrower definition of sustainable development, finding that it was relevantly concerned with improving the living conditions and/or social and economic conditions, which in this case was a remote objective or indirect consequence of preserving regional security in West African States.²⁰⁰

This case shows how different marginal definitions of environmental principles dictate (and are central to) their doctrinal influence, and demonstrates particularly the ambiguous nature of sustainable development. It also shows how sustainable development is distinct from other environmental principles in that it concerns matters

¹⁹⁸ Ex-TEU, Title V.

¹⁹⁹ *Small Weapons Case* (n63) [93].

²⁰⁰ Case C-91/05 *Commission v Council (Small Weapons)* [2008] 3 CMLR 5, Opinion of Advocate-General Mengozzi (19 September 2007) [206].

beyond environmental protection. This case is not one of the broad scope of EU environmental competence, but of the extensive competence of EU institutions generally, as informed by the principle of sustainable development. However, this case follows the pattern of environmental principles in this Chapter's doctrinal map, involving action first taken by EU institutions on the basis, *inter alia*, of the sustainable development principle, which principle then takes on a doctrinal role in determining the legality of that action under EU law.

2 Exercise of EU Environmental Competence Cases

So far, this Section has mapped informing legal test cases in which environmental principles have been used doctrinally in testing the proper *boundaries* of EU competence. In this sub-category of cases, environmental principles are employed to inform legal tests of review in relation to acts taken by EU and Member State institutions on the basis of environmental principles *within* the scope of EU environmental competence. The question is not whether the correct institutions adopted an EU measure, by the correct legislative procedure, or whether they had the power to do so. Rather the question is whether the relevant institution exercised its policy discretion validly under EU law, on grounds other than lack of competence.

These grounds include a range of EU 'administrative law' tests, such as proportionality and manifest error of assessment discussed above,²⁰¹ as well as breach of substantive internal market rules. Review tests in relation to the latter ground apply to Member State action, examined particularly in Section F(2)(e) below, in cases concerning

²⁰¹ Above, nn28-29.

infringement of the free movement of goods obligation in Article 34 TFEU. In these cases, Member States purport to act on the basis of environmental principles, thereby justifying infringement of Article 34, and the Court employs a number of tests to determine the legality of this action. The Treaty gives some guidance as to the ‘law’ to be applied in these cases: Article 36 TFEU provides a general description of some market disruptive measures (infringing Article 34) that Member States are entitled to take in the name of public health, and to an extent environmental, protection.²⁰² However, this provision gives no clues as to the nature of or limits to that idea, leaving doctrinal space for the courts to use environmental principles, particularly in relation to the test of proportionality applied by the Court to qualify reliance on Article 36.²⁰³

Further, this Treaty justification has been narrowly construed by the ECJ,²⁰⁴ and the Court has developed its own doctrine beyond this to determine when Member States might justify infringement of Article 34 – a ‘rule of reason’.²⁰⁵ This doctrine involves a number of stages of reasoning and two legal tests in particular: Member States might justify infringement of Article 34 on the basis of a mandatory or imperative requirement (including environmental or public health protection) when the relevant measure is (1) indistinctly applicable to domestic and imported goods (‘discrimination’ test), and (2) necessary and proportionate to its objective.²⁰⁶ Again, the ECJ has had scope to develop doctrine relating to these broadly-stated tests by employing environmental principles.

²⁰² Article 36 TFEU allows Member States to justify infringements of Article 34 on the ground of ‘the protection of health and life of humans, animals or plants’.

²⁰³ The open-ended nature of the legal inquiries provoked by Articles 34 and 36 are highlighted in academic analyses of Article 34 cases: Maduro, *We the Court* (n19) Chs 2, 3.

²⁰⁴ Case C-203/96 *Dusseldorp v Minister van Volkshuisvesting* [1998] ECR I-4075 [46].

²⁰⁵ *Cassis de Dijon* (n21) [8].

²⁰⁶ Case 302/86 *Commission v Denmark (Danish Bottles)* [1988] ECR 4607 [6], [9].

In all cases in this sub-Section, which are numerous, the review tests thus involve doctrine derived from the Court's own case law, in light of minimal Treaty guidance,²⁰⁷ and are broadly formulated so that environmental principles can play a role in their determination. The EU courts draw on environmental principles as the basis of the policy discretion exercised by the institutions and then use principles doctrinally to inform the relevant applicable legal tests. They do not use environmental principles as free-standing grounds of review for challenging the legality of any EU (or Member State) action. Any 'infringement' of an environmental principle found by the Court is used to inform a legal test of review.²⁰⁸ In using environmental principles to inform tests of review, the courts also ascribe marginal meanings to the principles in this body of case law.

In these cases, there is a progression from cases in which principles are employed by EU courts to inform legal tests of review (the rule of reason, proportionality), to cases in which the principles are discussed in greater detail by the courts and used also to generate legal tests (adequate scientific evidence) as well as to inform legal review tests (manifest error, proportionality). The latter developments have occurred, in particular, in relation to the precautionary principle in public health cases, inspired by the policy guidance in the Commission Communication.²⁰⁹ This progression of cases is examined sequentially in the sub-Sections that follow, demonstrating the increasing doctrinal complexity of environmental principles in this case law. This complexity includes the expanded scope of 'EU' environmental competence in which environmental principles

²⁰⁷ Cf Article 114(4)-(5) TFEU policy cases: above Section D(4).

²⁰⁸ Although this position may change: above n121-122 and accompanying text. Environmental principles might also be 'infringed' by Member State measures if they are expressed in sufficiently clear terms in *secondary legislation* so that they are directly effective in EU law: *Futura*, *Opinion of Advocate-General Kokott* (n32) [58]-[59]; cf *ERG* (n87) [46].

²⁰⁹ Communication (n56).

have legal roles in these cases, with the Court using principles to inform the legality of unilateral *Member State* action on environmental grounds, as well as action by EU institutions.

(a) Early Informing Legal Review Test Cases

In early cases, EU courts used environmental principles to inform legal tests applied to review EU and Member State discretion exercised in the overlapping domains of environmental, agricultural and public health policy. An early landmark and controversial case was *Walloon Waste*.²¹⁰ In this case, the principle of rectification at source was used by the ECJ to inform the rule of reason under Article 34 TFEU, in proceedings brought against Belgium for preventing the import of waste from other Member States. The issue was whether this infringement of Article 34 was justified by ‘imperative requirements relating to environmental protection’,²¹¹ which could only be relied on if the Belgian measure were indistinctly applicable to waste from Belgium and from other Member States. The ECJ found that the infringement was justified, and that the rule of reason applied. The Court referred to the principle of rectification at source, relied on in argument by Belgium, in resolving this legal question thus:²¹²

In assessing whether or not the barrier in question is discriminatory, account must be taken of the particular nature of waste. The principle that environmental damage should as a matter of priority be remedied at source, laid down by [Article 191(2)] of the Treaty as a basis for action by the Community relating to the environment, entails that it is for each region... to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as close as possible to the place where it is produced, in order to limit as far as possible the transport of waste... It follows that having regard to the

²¹⁰ Case C-2/90 *Commission v Belgium (Walloon Waste)* [1992] ECR I-4431. Cf Case C-209/98 *Sydhavnens Sten & Grus* [2000] ECR I-3743; Case C-320/03 *Commission v Austria* [2005] ECR I-9871.

²¹¹ *Walloon Waste* (n210) [29], [34]

²¹² *Ibid*, [34], [36].

differences between waste produced in different places and to the connection of the waste with its place of production, the contested measures cannot be regarded as discriminatory.

The principle of rectification at source here informs the test of discrimination that triggers the ‘imperative requirements’ justification, since it was prescribed in the EC Treaty as founding ‘Community environmental policy’.²¹³ Here the principle informs the rule of reason in such a way that expands the scope of EU environmental competence to include Member State action, which is also legally prescribed and delimited by environmental principles. This is not obviously the case, since Article 191(2) TFEU concerns *EU* (previously *Community*)²¹⁴ environmental policy, but the ECJ’s conclusion indicates that such policy includes *Member State* environmental policy when Member States are acting within the scope of EU law. In this way, EU environmental policy dictates the Member State policy that may be adopted to derogate from the Article 34 free movement guarantee in the name of environmental protection.²¹⁵

This doctrinal use of the principle of rectification at source is somewhat crude. The decision has been criticised on the ground that waste in one Member State is not in fact qualitatively different from waste in another Member State.²¹⁶ This crudeness might be explained by the ECJ’s inclination to endorse a policy that conformed to that prescribed by Article 191(2) TFEU and adjusting its legal reasoning to fit. The doctrinal

²¹³ Cf M Doherty, ‘Hard Cases and Environmental Principles: An Aid to Interpretation?’ (2004) 3 YEEL 57, 60-62; S Weatherill, ‘Publication Review: “Free Movement of Goods in the European Community” (Peter Oliver)’ (2003) 28(5) ELR 756, 758.

²¹⁴ Ex-Article 130r(2) EC.

²¹⁵ See Case C-463/01 *Commission v Germany* [2004] ECR I-11705 [74]. This resembles how EU fundamental rights doctrine has a wide-ranging scope in binding Member State action: C-260/89 *Elliniki Radiophonia Tiléorassi v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

²¹⁶ Eg F Jacobs, ‘The Role of the European Court of Justice in the Protection of the Environment’ (2006) 18 JEL 185, 189. Note the decision is out of date in light of the WSR (n107), which now applies to *all* waste shipments between Member States, and otherwise is likely overruled: *Stadtgemeinde* (n72) [59], [62]-[63], cf [69].

roles of environmental principles in EU law are thus not obvious or predictable. From this early case, environmental principles have come to inform *both* EU and Member State review tests, and, while they do so in different ways, they perform one overarching function: identifying the limits of the policy discretion afforded to EU and Member State institutions in the exercise of EU environmental competence.

The next early and fundamental informing legal test case, *BSE*,²¹⁷ involved the proportionality principle. Proportionality – a ‘general principle of Community law’,²¹⁸ – is an independent ground of review,²¹⁹ comprised of discrete legal tests, which limits the discretionary power of both EU and Member State institutions as they legislate and make decisions within the scope of EU law. The precise tests comprising, and manner of application of, the proportionality principle differ slightly from case to case, and particularly between review of EU and Member State measures.²²⁰ However, it is helpful to set out the basic three-pronged test of proportionality, which appears relatively consistently across contexts, and which is informed in various ways by environmental principles in the case law. The proportionality principle requires that:²²¹

1. measures adopted by EU institutions do not exceed the limits of what is *appropriate and necessary* in order to attain the objectives *legitimately pursued* by the legislation in question (‘necessity’ or ‘suitability’ test);
2. when there is a choice between several appropriate measures, recourse must be had to the *least onerous or restrictive*;

²¹⁷ Case C-180/96 *United Kingdom v Commission* [1998] ECR I-3906 (‘*BSE*’).

²¹⁸ *Ibid* [96].

²¹⁹ A ‘rule of law relating to [the application of the Treaties]’ under Article 263: above n28.

²²⁰ Case C-434/04 *Ahokainen & Leppik v Virallinen Syyttäjä* [2006] ECR I-9171, Opinion of Advocate-General Maduro (13 July 2006) [23]-[31]. Above n36.

²²¹ Case C-331/88 *Fedesa* [1990] ECR I-4023 [13].

3. the disadvantages caused must not be *disproportionate* to the aims pursued ('proportionality *stricto sensu*', or in a narrow sense).

These discrete limbs of the proportionality principle are informed differently by environmental principles in different cases,²²² and they will be referred to as relevant in the cases that follow.

BSE and its accompanying case *NFU*, were public health cases,²²³ which involved challenges to an emergency Commission decision banning the export of British beef.²²⁴ The 'precautionary principle', as recognised in later cases and the Commission Communication,²²⁵ was first defined (although not mentioned by name) in the following way by the ECJ in these cases:²²⁶

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

This principle represented a policy position that was permissible for the EU legislative institutions to adopt within this broad area of EU environmental competence, beyond the environmental title of the Treaty. It derived from Article 191,²²⁷ which the ECJ found applicable in this agricultural and public health domain since one of the objectives of Community environmental policy was the protection of human health and by virtue of the

²²² On environmental principles informing the elements of proportionality, see N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002) 291-391. Cf J Scott, 'The Precautionary Principle before the European Courts' in R Macrory, I Havercroft and R Purdy (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004) 54.

²²³ In this expanded area of EU environmental competence, extensive treatment of the precautionary principle in review cases has developed.

²²⁴ *BSE* (n217); Case C-157/96 *Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers' Union* [1998] ECR I-2265 ('*NFU*'). References will be to *BSE* only, since *NFU* is identical in all relevant respects.

²²⁵ Eg *Monsanto* (n5) [111]; Communication (n56) 24.

²²⁶ *BSE* (n217) [99].

²²⁷ Ex-Article 130r EC.

integration principle.²²⁸ Having acknowledged the precautionary principle as demarcating the scope of permissible policy discretion in this case, the ECJ proceeded to use it to inform the first suitability limb of the proportionality test applied in reviewing the legality of the contested Commission decision. The ECJ found that, in the context of EC agricultural policy, Community institutions in that domain had considerable discretion; the legality of a measure taken could only be adjudged relevantly unsuitable in determining its proportionality if ‘manifestly inappropriate’ in relation to the objective pursued.²²⁹ In this case, where the risks to human health were uncertain, it was not manifestly inappropriate for the institutions to adopt protective measures before the reality of risks became apparent.²³⁰

Thus, the precautionary principle, as identified by the Court, marked out the permissible area of Community discretion to which the courts would defer, so informing part of the legal review test applied by the ECJ.²³¹ This doctrinal treatment of the precautionary principle, informing proportionality review, is a trend that extends throughout the cases that follow. In later informing legal test cases involving proportionality, environmental principles are also used to inform other parts of the three-part test set out above.²³² The formulation of the precautionary principle in *BSE* is perceived as its classic formulation in EU case law,²³³ particularly due to its repetition

²²⁸ *BSE* (n217) [100]. Above n50, and accompanying text.

²²⁹ *Ibid* [97].

²³⁰ *Ibid* [99], [103].

²³¹ In Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00, T-141/00 *Artegodan v Commission* [2002] ECR II-4945, the CFI acknowledged that the precautionary principle was ‘implicitly applied in the review of proportionality’ in *BSE*: [185].

²³² Eg *Pfizer* (n29) [441]-[444] (duty to take less onerous measures), [456], [471] (narrow disproportionality); Case C-304/01 *Spain v Council* (ECJ 9 September 2004), Opinion of Advocate-General Kokott (18 November 2003) [68] (narrow disproportionality); Case T-158/03 *Industrias Químicas del Vallés v Commission* [2005] ECR II-2425 [133], [137] (identification of objectives legitimately pursued).

²³³ Jans and Vedder, *European Environmental Law* (n8) 38.

and adaptation in later cases.²³⁴ However, its subsequent adaptation (alongside evolution of other elements) demonstrates how its definition is manipulated and altered in different EU contexts, giving rise to different definitions of the principle.²³⁵ There is no universal definition of the principle; rather there are patterns of doctrinal reasoning with associated marginal definitions.

Another set of bold early informing legal test cases is seen in the Opinions of Advocates-General Jacobs and Geelhoed in two cases in which Member State actions infringing Article 34 TFEU were under review: *PreussenElektra* and *Commission v Austria*.²³⁶ Frustrated by the ECJ's opaque and inconsistent reasoning in applying the rule of reason in environmental Article 34 cases – particularly in *Walloon Waste* above²³⁷ – Advocate-General Jacobs in *PreussenElektra* suggested that the Court should abandon the discrimination test altogether from its rule of reason analysis where infringing Member State actions are based on environmental protection objectives. The Advocate-General relied particularly on the integration principle in Article 11 TFEU²³⁸ to justify this suggested doctrinal development.²³⁹ Advocate-General Geelhoed supported this position, if in a more nuanced way, in *Commission v Austria*.²⁴⁰ While the Court has not explicitly adopted this shift in doctrine, it has since avoided addressing the discrimination

²³⁴ Above, n160; *Pfizer* (n29) [139]; Case C-192/01 *Commission v Denmark* [2003] ECR I-9693 [49].

²³⁵ *Ibid*; cf n306 below.

²³⁶ *PreussenElektra*, Opinion of Advocate-General Jacobs (n117); Case C-320/03 *Commission v Austria* [2005] ECR I-9871, Opinion of Advocate-General Geelhoed (14 July 2005).

²³⁷ Above, text accompanying nn210-216.

²³⁸ Ex-Article 6 EC.

²³⁹ *PreussenElektra*, Opinion of Advocate-General Jacobs (n117) [230]-[231].

²⁴⁰ *Commission v Austria*, Opinion of Advocate-General Geelhoed (n236) [107].

question in most environmental Article 34 cases, focusing its reasoning on the issue of proportionality instead.²⁴¹

A final early case in which an environmental principle is used to inform a legal review test is *Safety Hi-Tech*.²⁴² In this case, the legality of a Council Regulation banning the use and marketing of certain ozone-depleting substances was indirectly challenged in a preliminary reference action, on the ground that it breached Article 191(2) TFEU for failing to ensure a ‘high level of protection’,²⁴³ since it did not ban *all* ozone-depleting substances. The relevant review test applied by the ECJ in this case was whether the measure, based on Article 192(1) TFEU, constituted a ‘manifest error of appraisal’ by the EU institutions in exercising the policy discretion under Article 191 TFEU (ex-Article 130r EC), particularly on the basis of the ‘principle’ of a high level of protection.²⁴⁴ In concluding that the institutions had made no such error, the ECJ reasoned that a high level of protection does not require the highest level of environmental protection technically possible – it is sufficient if such measures ‘contribute to the preservation, protection and improvement of the quality of the environment’.²⁴⁵ Thus, this environmental principle was marginally defined and used doctrinally to inform the legal review test in this case.

²⁴¹ Eg Case C-142/05 *Åklagaren v Mickelsson & Roos* (ECJ 4 June 2009). Note previous cases had also avoided the discrimination issue and focused on proportionality in examining Member State Article 34 infringements on environmental protection grounds: eg Case C-389/96 *Aher-Waggon v Germany* [1998] ECR I-4473.

²⁴² Case C-284/95 *Safety Hi-Tech Srl v S&T Srl* [1998] ECR I-4301.

²⁴³ Ex-Article 130r(2) EC.

²⁴⁴ The review test was so limited in light of the ‘need to strike a balance’ between Article 191 objectives and principles and the ‘complexity of the implementation’ of those criteria’: *Safety Hi-Tech* [37]. In other words, the courts will not overstep their proper constitutional role and meddle in the policy decision-making of the EU institutions unnecessarily.

²⁴⁵ *Ibid* [45], [49].

In these early informing legal test cases, environmental principles are used to mark out an area of permissible institutional policy discretion to which the courts defer, and then to inform the legal tests applied by the Community courts in reviewing exercises of such discretion. This is the particular manner in which environmental principles operate doctrinally in this EU law context. A similarity with the interpretive cases can also be seen in these cases: where the principles take on doctrinal roles, the courts define them marginally, substantiating them to the extent required to resolve the relevant legal issue.²⁴⁶

(b) *Pfizer*

The doctrinal role of the precautionary principle in EU case law does not stop at simply *informing* legal tests for reviewing institutional policy discretion. Its judicial treatment was expanded and complicated in two seminal decisions of the CFI reviewing the public health discretion of the (then) Community legislature, *Pfizer* and *Alpharma*.²⁴⁷ These cases mark a shift in the case law,²⁴⁸ with the precautionary principle being used to *generate* as well as inform legal tests of review in these cases. That shift was prompted by the Communication, which elaborated the Commission's view on applying the precautionary principle in its decision-making,²⁴⁹ the ideas and language of which resonate through *Pfizer* and later cases. Influenced by the contents of this policy document, the CFI gives the precautionary principle much more attention and doctrinal importance. In *Pfizer* and *Alpharma*, the precautionary principle is used both to generate a test of 'adequate scientific cogency and objectivity' and to inform the legal tests of

²⁴⁶ Above, text accompanying n164.

²⁴⁷ *Pfizer* (n29); Case T-70/99 *Alpharma v Council* [2002] ECR II-3495.

²⁴⁸ E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007) 229.

²⁴⁹ Chapter 3, nn93-101 and accompanying text.

manifest error of assessment and proportionality. Unpacking the complicated treatment of the precautionary principle in these cases is necessary to understand this dual role.²⁵⁰

Pfizer involved a challenge to Regulation 2821/98,²⁵¹ which withdrew Community authorisation for an antibiotic, virginiamycin, used as a growth promoter in animals reared for human consumption.²⁵² The Regulation was explicitly adopted on the basis of the precautionary principle,²⁵³ in light of the risk that use of virginiamycin as an animal growth promoter might promote antibiotic resistance in humans through animal consumption. *Pfizer* challenged the Regulation on eight different grounds, including manifest errors of assessment, breach of the principle of proportionality, and breach of the precautionary principle. Argued in this fashion, the precautionary principle looks like a stand-alone ground for challenging the review of EU measures. However, the precautionary principle is not a review test in the way that manifest error or proportionality are, rather it sets out a remit of substantive policy exercisable by Community institutions. The limits of this remit are policed by the other two review tests as informed by the precautionary principle including its test of adequate scientific risk assessment and objectivity deriving from the Commission's Communication.

The reasoning of the decision is lengthy and often difficult to follow; in particular, there are layers of reasoning involving the precautionary principle. The Court found that six of the grounds, including the three particularly relevant here (manifest error, and breach of proportionality and the precautionary principle), all 'in essence' concern

²⁵⁰ *Pfizer* (n29) will here be addressed in detail; *Alpharma* (n247) only where relevantly different.

²⁵¹ Council Regulation (EC) 2821/98 amending, as regards withdrawal of the authorisation of certain antibiotics, Directive 70/224/EEC concerning additives in feeding stuffs [1998] OJ L351/4.

²⁵² *Alpharma* (n247) involved a similar challenge to EC Council Regulation 2821/98, which also banned the use of antibiotic bacitracin zinc as a fattening agent in animal feed.

²⁵³ Regulation 2821/98 (n251), Recital 29.

alleged misapplication of the precautionary principle, and so were considered by analysing the application of that principle, understood as a *two-step* process of risk assessment and risk management.²⁵⁴ The CFI thus addressed alleged errors in risk assessment and risk management in turn, applying the various grounds of review that are legal tests (manifest error and proportionality) within this structure. With the reasoning so structured around the approach to the precautionary principle laid down in the Communication, it is difficult to understand precisely what legal tests the CFI applied and, more significantly for this mapping exercise, how it treated the precautionary principle. This is best understood in four steps.

First, the CFI found that, in cases of scientifically uncertain risk to human health, the precautionary principle permits EU institutions to take preventive measures without waiting for the reality or seriousness of those risks to become fully apparent.²⁵⁵ As in *BSE*, the Court relied on Article 191(2) TFEU²⁵⁶ to mark out this defined scope of permissible policy discretion in which EU institutions might act.²⁵⁷

Second, and unlike in *BSE*, the CFI examined closely the circumstances in which it there exists such scientifically uncertain risk.²⁵⁸ At this stage, the CFI generated a new legal test: a scientific *risk assessment* must be carried out before any preventive measures can be taken in the name of the precautionary principle, to ensure that no arbitrary measures are adopted.²⁵⁹ While a full scientific risk assessment cannot be carried out,

²⁵⁴ *Pfizer* [108].

²⁵⁵ *Ibid* [140]-[141], [385]-[386].

²⁵⁶ Ex-Article 130r(2) EC.

²⁵⁷ *Pfizer* [114], [140].

²⁵⁸ This is in response to Pfizer's argument that the Community institutions did not correctly assess the scientific risk in this case, and adopted the Regulation 'for reasons of political expediency without a proper scientific basis': *ibid* [127].

²⁵⁹ *Ibid* [155], [162].

since by definition we are in the territory of imperfect scientific information, another dimension was introduced to shape the test of adequate scientific evidence developed by the CFI: ‘as thorough a scientific risk assessment as possible’, founded on the principles of ‘excellence, transparency and independence’, must be carried out to give the institutions ‘sufficiently reliable and cogent information’ on which to base their policy decision.²⁶⁰ This risk assessment requirement was influenced by Community policy, as set out in the Communication and other Commission policy documents.²⁶¹ The CFI here generated a legal test, based on EU policy.

Third, the CFI identified two aspects of this *risk assessment* exercise: determining the level of risk to human health deemed unacceptable for society, and then conducting a scientific assessment of the risks.²⁶² With respect to the former, which involves deciding political objectives, EU institutions enjoy a broad discretion, and any decision taken can only be vitiated by judicial review on the grounds of manifest error, misuse of powers or clear excess of discretion.²⁶³ Unhelpfully, the CFI did not elaborate these tests, but the result of the case helps to illuminate them, since no such vitiation was found on the facts. In relation to the second aspect of risk assessment, which the Court spent considerably more time examining on the facts, the same limited tests are applicable in judicially reviewing the scientific risk assessment undertaken by the institutions. In this case, since the Community institutions were required to ‘evaluate highly complex scientific and technical facts’, their discretion is broad and it was not the place of the CFI to substitute

²⁶⁰ Ibid [162], [172].

²⁶¹ Ibid [158].

²⁶² Ibid [149].

²⁶³ Ibid [166].

its assessment of the facts.²⁶⁴ Again, the result of the case demonstrates the breadth of the institutions' discretion in drawing conclusions from the scientific material to which they have access. Even when the CFI came close to suggesting that inadequate (scientific) reasons were given by the Community institutions for taking a certain position with respect to the scientific evidence – concerning their refusal to adopt the conclusions drawn by the Scientific Committee on Animal Nutrition (an advisory EU scientific body) that no immediate risk was posed by virginiamycin to human health – the Court deferred to the institutions, finding that they adequately explained their divergent opinion by relying on the precautionary principle!²⁶⁵ No manifest error was committed, since the institutions have the political responsibility and entitlement to adopt measures in the interests of human health protection, notwithstanding scientific uncertainty. In essence, and after much analysis, the CFI found that sufficient reliable and cogent scientific evidence (including international scientific reports and a Danish study on live rats) existed for the institutions to conclude that a risk to human health was posed, albeit an uncertain one, by the use of virginiamycin in animal feed.²⁶⁶ In the midst of this reasoning, verging on circularity, the precautionary principle, operating on multiple levels, both generated a review test (of scientific adequacy/cogency of the risk assessment carried out by the Community institutions) and informed the manifest error standard applied to meet that test.

²⁶⁴ Ibid [169], [323].

²⁶⁵ Ibid [204]-[205], [208].

²⁶⁶ In *Alpharma*, the CFI similarly held that the Community institutions had sufficiently objective and cogent scientific evidence on which to adopt preventive measures, despite their failure to obtain a SCAN opinion or to wait for a relevant forthcoming scientific report. It was in keeping with the precautionary principle, 'in the context of their broad discretion and their responsibility for defining the public health policy', not to await more detailed scientific research: *Alpharma* (n247) [317]-[318].

Fourth, in the second section of its reasoning engaging the precautionary principle, the CFI was concerned with the *risk management* decisions made by the Community institutions. It examined whether imposing a total ban on the use of virginiamycin in animal feed, as a response to the identified uncertain risk, was vitiated by manifest error, again in light of the broad discretion of the institutions in adopting such a scientifically complex political decision. At this point the manifest error and proportionality review tests collide in the Court's reasoning, with the CFI applying a four-pronged proportionality test to determine whether any manifest error was committed by the institutions.²⁶⁷ The precautionary principle was employed by the Court to inform all four aspects of the proportionality inquiry, expanding its role as identified in *BSE* and reinforcing the treatment of the precautionary principle as informing legal review tests.²⁶⁸ As in *BSE*, the suitability test was met since the ban was a preventive measure appropriately adopted on the basis of the precautionary principle.²⁶⁹ In determining that a less onerous measure need not have been adopted, applying the second limb of proportionality, the CFI found that the ban was consonant with the precautionary principle, which can 'require' a public authority to act before any adverse effects have become apparent.²⁷⁰ Another dimension to the precautionary principle informed whether the ban was 'disproportionate', under the third limb of proportionality identified earlier (considered in two parts). The CFI concluded that 'the protection of public health... must

²⁶⁷ The same three tests of proportionality as identified above (above, text accompanying n221) are applied, along with an additional test of whether the disadvantages caused by Regulation 2821/98 are disproportionate to the advantages if no action were taken (on a cost-benefit analysis): *Pfizer* (n29) [413]. Note that this collision of the tests of manifest error and proportionality does not occur consistently in the case law, eg in *Alpharma*, the CFI undertakes a proportionality inquiry separately from its inquiry into manifest errors of assessment: *Alpharma* (n247) [320]-[369].

²⁶⁸ *Pfizer* (n29) [419], [444], [456], [471].

²⁶⁹ *Ibid* [417], 419].

²⁷⁰ *Ibid*, [444]. Cf Joined Cases C-11/04, C- 12/04, C-194/04 & C-453/03 *ABNA Ltd v Secretary of State for Health* [2005] ECR I-10423.

take precedence over economic considerations’.²⁷¹ This policy assertion by the CFI does not necessarily follow from the elaboration of the precautionary principle so far (in this case or in *BSE*): it is an aspect of the principle that is adopted in some later case law and represents a new marginal definition of the precautionary principle.²⁷²

In summary, from *Pfizer*, the discretionary latitude afforded to EU institutions to act on the basis of the precautionary principle is triggered by ‘adequate’ scientific assessment, which gives the institutions a broad discretion to take preventive measures. This trigger is a legal test of adequate scientific objectivity and cogency in the identification of (uncertain) risk, which is *generated* by the precautionary principle. The resultant discretion, also an aspect of the principle, *informs* the judicial review tests of manifest error and proportionality that are applied (here together) to monitor the limits of policy decisions taken by EU institutions. When ‘breach of the precautionary principle’ is pleaded in argument, the legal plea is thus interpreted by EU courts as raising some combination of these tests. The precautionary principle both prompts deference by the courts to discretion exercised by EU institutions, and also operates doctrinally (both generating and informing legal tests) to the extent that the courts are charged with reviewing the limits of its application by EU institutions. The review cases that follow pick up on these different aspects of the judicial treatment of the precautionary principle in reviewing EU and Member State action taken on the basis of the principle. While the reasoning in these cases is often conflated, as in *Pfizer*, these doctrinal trends can be discerned.

²⁷¹ *Pfizer* (n29) [456], [471].

²⁷² *Artegodan* (n231) [184], *Solvay* (n122) [121].

(c) Precautionary Principle Post-*Pfizer* in the CFI: More Generating and Informing Legal Tests

Following *Pfizer*, other CFI cases involving review of EU public health measures have treated the precautionary principle doctrinally to generate a legal test of adequate scientific evidence, expressed in various forms. As in *Pfizer*, this role is conflated with its role in informing other legal review tests applied. The increased scrutiny of EU institutional discretion that comes with these layers of tests reveals the CFI adopting an increasingly robust constitutional role in deepening the doctrinal role of the precautionary principle. However, the courts still acknowledge the discretion of EU institutions in applying the precautionary principle within properly reviewed limits.²⁷³

Artegodan, discussed above,²⁷⁴ is a decision in which the CFI found that there was inadequate objective scientific evidence to justify, on the basis of the precautionary principle, the challenged exercise of Commission discretion. The Commission failed the test of adequate scientific evidence generated by the precautionary principle in this case. Various pharmaceutical manufacturers had challenged Commission decisions withdrawing marketing authorisation for medicinal products containing particular amphetamines used in the treatment of obesity.²⁷⁵ The legal grounds adduced to challenge the decisions were, as in *Pfizer*, numerous and overlapping, and notably they did not include ‘infringement of the precautionary principle’. The CFI introduced the precautionary principle in its reasoning to inform the permissible scope of the Commission’s discretion in making decisions to withdraw marketing authorisations under

²⁷³ Cf *Monsanto* (n5) [113].

²⁷⁴ Chapter 2, nn189-192.

²⁷⁵ *Artegodan* (n231); see also Case T-147/00 *Les Laboratoires Servier v Commission* [2003] ECR II-85.

Article 11 of Directive 65/65 relating to medicinal products.²⁷⁶ The logic of its approach was different from that in *Pfizer* – in particular, it identified the precautionary principle as having been *implicitly* relied on by the Commission and as a ‘corollary’ of the ‘general principle’ that the requirements of the protection of public health are to prevail over economic interests.²⁷⁷ The provisions of Article 65/65 must be interpreted in accordance with this precautionary principle, which ‘requires’ (rather than allows) Community institutions to take measures to prevent specific potential risks to public health, safety and the environment.²⁷⁸ In this way, the CFI defines the precautionary principle (that is, the policy discretion based on it) slightly differently in this case.²⁷⁹

As in *Pfizer*, however, the precautionary principle was identified as deriving from Article 191(2), applying generally in the public health domain to guide the discretion of the Commission,²⁸⁰ and on which the Commission *implicitly* based its decisions in this case.²⁸¹ Further, as in *Pfizer*, the precautionary principle generates a (slightly differently formulated) test of adequate scientific evidence: the Commission can only rely on the precautionary principle in exercising its discretion to withdraw authorisation if ‘a new potential risk or the lack of efficacy is substantiated by new, objective, scientific [evidence]’.²⁸² On the facts, the CFI found that there was no such new, objective evidence and the Commission decisions were thereby vitiated. As in *Pfizer*, the CFI set

²⁷⁶ Authorisation could be withdrawn where it is harmful in its normal use, lacking in therapeutic efficacy, or misleading as to its qualitative and quantitative composition: Council Directive (EC) 65/65 on the approximation of provisions laid down by law, regulation or administrative action relating to medicinal products [1965-6] OJ Spec Ed 20 (as amended), Art 11.

²⁷⁷ *Artegodan* (n231) [174]. Above n272.

²⁷⁸ *Ibid* [184]. For a similar approach to the precautionary principle: *Solvay* (n122) [121].

²⁷⁹ Note *Artegodan* (n231) was decided by a different chamber of the CFI shortly after *Pfizer* (n29) and *Alpharma* (n247) were handed down.

²⁸⁰ As a ‘general principle of Community law’: *Artegodan* (n231) [184].

²⁸¹ *Ibid* [174].

²⁸² *Ibid* [194]. Although such evidence does not need to ‘[resolve] the scientific uncertainty’: [192].

out the manifest error test in framing its inquiry, so that the test of adequate scientific evidence generated by the precautionary principle in turn informed the manifest error test more broadly (however the Court does not put it so nicely). So viewed, the precautionary principle both generates and informs legal tests of review in this case.

Unlike in *Pfizer*, however, the CFI did not defer (on the basis of the precautionary principle) to the assessment of complex scientific material made by the Commission, perhaps because the Commission in this case relied on the advice of the scientific body that it was bound to consult under Directive 65/65 – the Committee for Proprietary Medicinal Products (‘CPMP’) Instead, the Court strictly applied its test of adequate scientific evidence to the CPMP Opinion, finding an unsatisfactory basis for the Commission’s exercise of discretion based on the precautionary principle, since it disclosed no new scientific evidence, merely a change in clinical practice with respect to the contested medicines. The intensity of the scientific (and legal) review applied in this case is arguably undermined because, firstly: (1) the CFI’s reasoning based on the precautionary principle was superfluous since the Court had already found that the Commission was not competent to adopt the contested decisions on other grounds²⁸³, and (2) no case that has followed *Artegodan* has submitted Community measures to such intense scrutiny, rather they have deferred to the institutions’ application of precautionary principle and identified the scope of its policy discretion broadly.

In *Solvay*,²⁸⁴ the CFI similarly applied a test of adequate scientific evidence, generated by the precautionary principle, to inform the manifest error of assessment test in reviewing an EC Regulation withdrawing the authorisation of the substance Nifursol

²⁸³ Ibid [155].

²⁸⁴ *Solvay* (n122).

for use in animal feed.²⁸⁵ In this case, the CFI explicitly stated that the applicant's argument that the contested regulation 'infringes' the precautionary principle, in isolation, was incorrectly put.²⁸⁶ Infringement of the principle is not a stand-alone ground of review; rather, the principle was employed to interpret the applicable provisions of Directive 70/524,²⁸⁷ and then to inform the review test of manifest error of assessment. In so reasoning, the CFI required there to be 'solid' or 'sufficiently serious' scientific evidence, based on recent studies, demonstrating a risk to human health.²⁸⁸ Again, the Court formulates a test of adequate scientific evidence, in slightly different terms. The Court then proceeded to elaborate a more detailed definition of the precautionary principle informing the review test in this case. Thus the principle did not imply urgency, so that action on the basis of the principle may be deferred 'on the basis of the nature, the seriousness and the scope of [the relevant] risk on the basis of a balancing of the various interests involved'.²⁸⁹ At the same time, however, the EU institutions were entitled to adopt a policy of 'zero tolerance' (different from hypothetical risk) in relation to potential risks to human health posed by feed additives. The Court explained that this manifestation of the precautionary principle was different from that under other EU public health regimes, such as that in *Artegodan* relating to medicinal products, because the regulatory regimes were different.²⁹⁰ Again, the precautionary principle was given a marginal definition in order to fulfil a doctrinal role.

²⁸⁵ Ibid [129], [144].

²⁸⁶ Ibid [120].

²⁸⁷ Above n170.

²⁸⁸ *Solvay* (n122) [129], [133].

²⁸⁹ Ibid [135]. In addition, the burden of proof lay on the applicant to disapprove reasonable doubts raised in relation to the health risks posed by the substance: [146].

²⁹⁰ Ibid [148]-[149].

(d) Precautionary Principle Post-*Pfizer* in the ECJ: More Informing Legal Tests

There have also been a group of cases decided by the ECJ since *Pfizer*, in which the precautionary principle has been used doctrinally to inform legal tests in reviewing EU measures, but in which the Court has not tested the adequacy of the scientific evidence relied upon by the institutions in adopting measures based on the precautionary principle.²⁹¹ The Court acknowledges that actions based on the principle must be based on a ‘comprehensive risk assessment’ of health risks determined by the most recent and reliable scientific data available,²⁹² but does not question this information or its credibility in these cases. In these cases involving the review of EU institutional discretion, the courts have employed the precautionary principle to inform the test of proportionality. In these cases, the grounds of review pleaded in argument (or framed in the preliminary reference) focus on the issue of proportionality, and mostly do not directly raise the questions of manifest error or ‘infringement’ of the precautionary principle;²⁹³ this might explain the narrower treatment of the precautionary principle by the courts.²⁹⁴

Agrarproduktion Staebelow is a good example of these informing legal test cases.²⁹⁵ In this case, the ECJ found that Article 13(1)(c) of Regulation 999/01,²⁹⁶ which required animals at risk of contracting identified BSE to be slaughtered, was not invalid

²⁹¹ Joined Cases C-154/04 & C-155/04 *Alliance for Natural Health v Secretary of State for Health* [2005] ECR I-6451; Case C-504/04 *Agrarproduktion Staebelow v Landrat des Landkreises Bad Doberan* [2006] ECR I-679; Case C-343/09 *Afton Chemical Ltd v Secretary of State for Transport* (ECJ 8 July 2010).

²⁹² *Afton* (n291) [60].

²⁹³ Cf *ibid* [9].

²⁹⁴ In *Agrarproduktion* (n291), the only question referred to the ECJ was whether the contested provision infringed the principle of proportionality. In *Alliance*, a number of grounds, other than proportionality, contesting the validity of particular Community provisions were also referred (including absence of legal basis, infringement of the principles of subsidiarity and equal treatment and failure to give reasons), although these were unlikely to raise issues relating to the precautionary principle; there was no pleaded ground of ‘infringement of the precautionary principle’.

²⁹⁵ *Agrarproduktion* (n291).

²⁹⁶ Council & Parliament Regulation (EC) 999/2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies [2001] OJ L147/1.

in light of the proportionality principle. In resolving the proportionality inquiry, the ECJ used the precautionary principle to resolve the first limb ‘appropriateness’ test, as in *BSE*. The measures adopted by the Community legislature were found to be appropriate to the objective of the protection of human health, in light of the policy discretion afforded to Community institutions to take preventive measures in cases of scientific uncertainty.²⁹⁷ In the subsequent case of *Afton Chemical*,²⁹⁸ the ECJ used the precautionary principle to inform the third limb of the proportionality inquiry, finding that there was no lack of proportionality in a narrow sense in a provision of Directive 2009/30,²⁹⁹ which introduced an upper limit of a particular chemical in fuel. The uncertainty in relation to the environmental and health damage caused by the chemical meant that the limit was not manifestly disproportionate in relation to the economic interests of the producers of the chemical.³⁰⁰

In contrast to *Pfizer* and *Artegoda*, the ECJ in *Agrarproduktion* and *Afton Chemical* does not test the scientific uncertainty to determine whether the precautionary principle was justifiably exercised by the Community institutions; rather it accepts the identification of that uncertainty and the limited scientific assessment so far undertaken in relation to the relevant health risks.³⁰¹ It might be concluded that the ECJ has adopted a different jurisprudence from that of the CFI with respect to the precautionary principle, a doctrinal approach that is more deferential to the discretion of EU institutions. The ECJ treats it as a principle that marks out an area of permissible policy discretion and so

²⁹⁷ *Agrarproduktion* (n291) [38]–[43].

²⁹⁸ *Afton* (n291).

²⁹⁹ Council & Parliament Directive (EC) 2009/30 regarding the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions [2009] L140/88.

³⁰⁰ *Afton* (n291) [68].

³⁰¹ *Ibid*, [58]–[59]; *Agrarproduktion* (n291) [41]–[42].

informs review tests, rather than a principle that generates such tests and intrudes more deeply into decision-making by EU institutions. However, this is arguably also due to the nature of the arguments/references put to the respective courts. As will be seen from the Article 34 cases discussed in the following sub-Section, the ECJ has not shied away from treating the precautionary principle as a principle that generates legal tests in all cases.

(e) Doctrinal Conflation and Expansion for Environmental Principles: Informing the Review of Member State Discretion under Article 34 TFEU

The conflation of the doctrinal roles for the precautionary principle, in generating and informing legal review tests, identified particularly in *Pfizer*, *Artegoda* and *Solvay* above, is also seen in another set of ECJ cases, involving review of *Member State* discretion in the public health domain. In these Article 34 TFEU infringement cases, the judicial techniques involving the precautionary principle in informing and generating legal tests again collapse into one another. The ECJ uses a test of adequate scientific evidence – again inspired by the Commission’s Communication and its focus on risk assessment, latterly enshrined in EU secondary legislation³⁰² – to inform the legal review test of proportionality.

These cases involve review of Member State discretion that relies on the precautionary principle, similar to the review of Member State discretion (relying on the principle of rectification at source) analysed in *Walloon Waste*.³⁰³ The difference is that these cases do not involve the ‘rule of reason’ justification for infringing Article 34, but the public health justification in Article 36. In these public health cases, the ECJ is

³⁰² Council & Parliament Regulation (EC) 178/2002 laying down the general principles and requirements of food law [2002] OJ L31/1, Articles 6&7.

³⁰³ Above, text accompanying nn210-213.

focused on interpreting the Article 36 exception strictly.³⁰⁴ Thus the Court employs the proportionality principle to qualify reliance on Article 36, as informed by the precautionary principle, requiring that a current and detailed scientific assessment of the risk alleged by the Member State must demonstrate a real risk to public health and thus the ‘necessity’ of the contested measure.³⁰⁵ The precautionary principle, which generates this test of adequate scientific evidence (in another formulation focusing on adequate risk assessment),³⁰⁶ is thus treated as informing the first limb of the proportionality inquiry in these cases. Only by satisfying the review tests so generated and informed can Member State discretion, relying on the precautionary principle, be compatible with Article 36. In these cases, the precautionary principle expresses lawful Member State policy discretion within the prescribed policy framework of the Treaty (expanding the area of EU environmental competence to include Member State environmental actions within the scope of EU law), and also informs and generates the legal tests applied by the ECJ to monitor the limits of that discretion.

Commission v Denmark is the seminal Article 34 case that involves this conflated treatment of the precautionary principle,³⁰⁷ with its reasoning followed by later cases.³⁰⁸ In this Article 258 infringement action brought by the Commission, the Danish government argued that its administrative practice of banning nutrient-enriched foods lawfully marketed or produced in other Member States unless they met a need in the

³⁰⁴ Case C-24/00 *Commission v France* [2004] ECR I-1277 [87].

³⁰⁵ *Commission v Denmark* (n234) [45]-[46].

³⁰⁶ The most common version is that in *Commission v France*: ‘a correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health... 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’: *Commission v France* (n304) [92].

³⁰⁷ *Commission v Denmark* (n234).

³⁰⁸ Case C-95/01 *Criminal Proceedings Against Greenham and Abel* [2004] ECR I-1333; Case C-41/02 *Commission v Netherlands* [2005] ECR I-11375; Case C-219/07 *Nationale Raad van Dierenkwekers en Liefhebbers VZW v Belgische Staat* [2009] Env LR D2; *Commission v France* (n304).

Danish population, which infringed Article 34, was justified on public health grounds. In particular, this practice was justified since the risks of overexposure to vitamins and minerals were uncertain and so danger to human health could not be excluded.³⁰⁹ The ECJ had previously dealt with similar cases, in which products lawfully marketed in some Member States were refused marketing authorisation in others ostensibly on public health grounds, in the light of uncertain risks to health. In those cases, the ECJ had consistently held that Member States, while scientific uncertainties persisted, and in the absence of Community harmonisation, had discretion to limit the marketing of such products, so long as they demonstrated that their marketing constituted a serious risk to human health.³¹⁰

In *Commission v Denmark*, the ECJ explicitly adopted reasoning, albeit similar, on the basis of the precautionary principle. Denmark had raised the precautionary principle in argument, asserting that its measures complied with the principle, as laid down in the Commission Communication.³¹¹ The ECJ responded by finding that the scope of discretion accorded to Member States in these cases reflected the precautionary principle,³¹² and went on to consider what constituted a ‘proper application of the precautionary principle’ for the purposes of testing the limits of Denmark’s discretion in this case.³¹³ Relying on similar reasoning to that in *Pfizer*, the ECJ then found that applying the precautionary principle presupposed a detailed scientific risk assessment based on the most recent international research and the most reliable scientific data

³⁰⁹ *Commission v Denmark* (n234) [29].

³¹⁰ Case 174/82 *Sandoz* [1983] ECR 2445 [22]; Case 227/82 *Van Bennekom* [1983] ECR 3883 [40]; Case 178/84 *Commission v Germany (Beer Purity law)* [1987] ECR 1227 [46], Case C-228/91 *Commission v Italy* [1993] ECR I-2701 [27].

³¹¹ Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, Opinion of Advocate-General Mischo (12 December 2002) [16].

³¹² *Commission v Denmark* (n234) [49].

³¹³ *Ibid* [51].

available, which showed real likelihood of harm – that is, it generated a test of adequate scientific evidence demonstrating a relevant risk to public health. This test drew on both the judicial treatment of the precautionary principle in other EU case law, particularly *Pfizer*,³¹⁴ and the inspiration for that judicial treatment in the Communication. Once this test was satisfied, Member State institutions enjoyed a wide discretion to adopt restrictive measures in the face of scientific uncertainty.³¹⁵

The result of this transfer of doctrinal reasoning from EU to Member State review cases was that more comprehensive scientific inquiry was engaged in by the ECJ in *Commission v Denmark*, and in the Article 34 cases that followed.³¹⁶ In this way, the judicial treatment of the precautionary principle has developed a connected body of doctrine in EU law, which extends across different types of action, different EU courts, and different legal questions considered. However, these Article 34 cases remain distinct in that there is less deference to the scientific assessments undertaken by the Member States than in cases where EU measures are under review.³¹⁷ In the majority of cases, the ECJ finds that the scientific risk assessments relied on by the Member States to justify their infringing measures are inadequate.³¹⁸ This inadequacy then informs the test of proportionality applied.

³¹⁴ *Commission v Denmark*, Opinion of Advocate-General Mischo (n311) [96].

³¹⁵ *Commission v Denmark* (n234) [49] (drawing on the reasoning in *NFU* (n224)).

³¹⁶ *Commission v France* (n304); *Commission v Netherlands* (n308); *Commission v France* (n308). Cf *Greenham and Abel* (n308), in which the ECJ did not analyse the detail of the scientific assessment relied on, leaving the issue to be resolved by the French referring court.

³¹⁷ Case C-41/02 *Commission v Netherlands* [2005] ECR I-11375, Opinion of Advocate-General Maduro (14 September 2004) [30]: different consequences flow from ‘recourse to the precautionary principle’ depending on whether it is invoked by EU institutions or the Member States.

³¹⁸ Exceptions are the findings in *Sandoz* (n310) and concerning one of the contested measures in *Commission v France* (n304).

Thus, in *Commission v Denmark*, the Court found that the contested practice was disproportionate, since it systematically prohibited the marketing of all enriched foods, without distinguishing them according to the particular vitamins and minerals added or according to the level of public risk that their addition might pose.³¹⁹ The Danish practice failed the test of adequate scientific evidence generated by the precautionary principle, since no adequate risk assessment was carried out, and this failure informed the proportionality inquiry, vitiating the reliance on Article 36 – it could not be said that the practice was ‘necessary’ for the purpose of protecting public health.

There is also an outlying case in this sub-category – *Toolex Alpha*³²⁰ – in which the ECJ used a different environmental principle (the ‘substitution principle’) to inform the second limb of the proportionality test in assessing a Swedish public health measure that infringed Article 34 TFEU. In this case, Swedish legislation had banned industrial use of a chemical, trichloroethylene, subject to a system of individual exemptions. This system was found to constitute the least restrictive means of attaining the relevant public health objectives, because it was compatible with the substitution principle, which had ‘emerged’ in EU law.³²¹ This is because an exemption to the ban was granted when no safer replacement product was available *provided that* the applicant continued to seek less harmful solutions. In this way, the Court defined the substitution principle and used it to inform the proportionality inquiry.

In the cases in this sub-Section, the EU courts review the legality of EU environmental competence exercised by EU and Member State institutions on the basis of environmental principles. The courts apply distinct legal tests in reviewing these

³¹⁹ *Commission v Denmark* (n234) [55].

³²⁰ Case C-473/98 *Kemikalienspektionen v Toolex Alpha* [2000] ECR I-5681.

³²¹ *Ibid* [47].

‘applications’ of the principles. It is these tests that the courts are applying, not the principles themselves; the application of the latter is a task for the EU and Member State institutions. In this way, the legal tests applied by the courts monitor the limits of discretion granted by the principles, leaving to the institutions to the exercise of that discretion within those limits. ‘Breach of the precautionary principle’, as argued in *Pfizer* and *Solvay*,³²² is thus a misleading description of what the courts are examining in these cases. Rather the courts examine the decision-making processes adopted by political institutions when applying environmental principles through a variety of tests which are informed and even generated by those principles. In this way, environmental principles have doctrinal roles in this particular treatment category. This result makes sense only by appreciating the nature of the task and the constitutional role of the EU courts in reviewing exercises of EU and Member State policy discretion within the scope of EU environmental competence.

3 Conclusion

In this Section, environmental principles are employed by the EU courts doctrinally to inform legal tests of review. Through this body of case law, the scope of EU environmental competence in which EU and Member State institutions might act on the basis of environmental principles, thereby triggering such doctrinal roles, has been expanded in two ways. First, and reflecting legal developments in Sections D and E above, the integration principle expands this area of competence both within the Treaty’s environmental title (to include, for example, criminal matters) and beyond it to include agricultural and public health matters, the internal market and the EU’s common

³²² *Pfizer* (n29) [107]; *Solvay* (n122) [120].

commercial policy. In the latter sense, the use of the precautionary principle, in particular, in informing and generating legal tests within the area of public health is now a matter of routine for the EU courts. Second, through the ECJ's Article 34 case law, EU environmental competence has expanded to include unilateral Member State action, when implementing national environmental measures within the scope of EU law, so that environmental principles inform legal tests applied to review the legality of such Member State action. Thus there is an ever-increasing area of EU competence, and thus EU law, in which environmental principles have legal roles.

In all, environmental principles (particularly the precautionary principle) have generated a complex and detailed body of legal reasoning in this treatment category, which is dependent and focused on the competence of EU and Member State institutions to adopt environmental measures, broadly understood, in EU law. This reasoning also reflects the courts' (perception of their) proper constitutional role in reviewing institutional action. In early informing legal test cases, such as *Walloon Waste* and *BSE*,³²³ the ECJ employed environmental principles to mark out an area of policy discretion in which EU and Member State institutions could properly act (defining environmental principles marginally to do so), and thus to inform the relevant legal review test applied. In later cases, particularly post-*Pfizer*, the EU courts have become more penetrating, and less deferential, in their scrutiny of EU and Member State institutional discretion exercised on the basis of environmental principles. This reflects a bolder constitutional role for the courts, and a more complex doctrinal role for environmental principles.

³²³ *Waste Directive Case* (n187).

As a result, the doctrinal roles for environmental principles in this Section are seen to be highly contingent on EU legal culture, and particularly on the scope of EU environmental competence, the openness of its existing legal doctrine to influence by environmental principles, and the proper constitutional role of the EU courts in reviewing the discretion of EU and Member State institutions. In light of such EU law contingencies, environmental principles, in EU law, do not neatly meet the high scholarly hopes of resolving legal and environmental problems set out in Chapter 2. Thus, it is difficult to say that environmental principles might *unify* EU environmental law. While they might be said to influence the *extent* of EU environmental law, due to their doctrinal inter-relationship with the scope of EU environmental competence, this relationship also demonstrates that EU environmental law overlaps with *other* areas of EU law, particularly by virtue of the integration principle. Environmental principles also do not look like Dworkinian legal principles in this treatment category, nor are they embraced by the EU courts as guiding a new body of substantive law. In terms of solving environmental problems, environmental principles do not provide free-standing legal grounds the challenging, or compelling, environmental action (to be) taken by EU or Member State institutions under EU law. Rather, they inform and generate legal tests for reviewing environmental action first taken by those institutions, and also preserve an area of discretion within which the institutions may lawfully act on the basis of the principles without judicial interference or legal compulsion to act in any particular way.

G CONCLUSION

This Chapter has mapped the judicial treatment of environmental principles to identify the roles played by environmental principles in EU case law. This mapping exercise also demonstrates how scholarly hopes for environmental principles measure up against their

developing roles in the EU law context. To identify the legal roles played by environmental principles, the cases in which environmental principles have appeared were mapped doctrinally in treatment categories, according to the techniques used in employing the principles (or not) in judicial reasoning. Three treatment categories were identified: policy cases, interpretive cases, and informing legal test cases. This mapping categorisation is not meant to be definitive, especially since the same case may fall within more than one category, and the categories are themselves not qualitatively equivalent in generating a taxonomy of judicial reasoning. Rather, it demonstrates that the principles perform very particular legal functions in EU law, which are shaped and constrained by influences of EU legal culture. In the policy cases, environmental principles have no role in influencing the legal outcome of the cases, showing there are limits to the doctrinal roles of environmental principles, and to the role of the EU courts in accepting arguments based on environmental principles. Environmental principles do not act as free-standing legal principles on which the courts might draw to resolve all or any of the legal issues before them. Rather, EU (or Member State) institutions must first act on the basis of the principles within the scope of EU environmental competence, and this action may then be called into question legally, either in terms of its interpretation or of reviewing its legality. In both these senses, environmental principles are used by the EU courts doctrinally, constituting the two treatment categories – interpretive cases and informing legal test cases – in which environmental principles have legal roles.

There are also a number of finer EU law contextual influences that affect the mapping of this case law. First, environmental principles will only have doctrinal roles where the applicable EU law doctrine and legal test is open-textured enough to allow this. Thus arguments based on environmental principles, in defending unilateral Member State actions on environmental grounds, are rejected in Article 114(4) and (5) cases but

accepted in Article 34 cases. Second, the proper constitutional role of the EU courts is reflected in the case law in various ways. It constrains the actions of the courts, requiring prior action by EU or Member State institutions before the courts will employ environmental principles doctrinally. This is because environmental principles represent policy positions which it is for the institutions to adopt, with the courts having a role to interpret or police the permissible boundaries of this policy discretion once exercised. At the same time, the courts must allow decisions to be made, and so they employ principles both to scrutinise such policy discretion closely for its meaning and legality (giving marginal definitions to environmental principles to do so), and also to defer to policy decisions made within the legally identified ambit of discretion. This produces case law that can be difficult to classify doctrinally and can, at worst, appear circular or contradictory (as in *Pfizer* and its use of the precautionary principle). Further, the constitutional position of the EU courts is strengthened by the courts' creative and more complex doctrinal use of the precautionary principle, as developed in both generating and informing legal review tests post-*Pfizer*.

Third, the size of the EU law map in which environmental principles have legal roles has been extended as the case law has progressed, particularly by virtue of the integration principle expanding the scope of EU environmental competence, and by the inclusion of Member State action within this area of competence. At the same time, doctrine has developed around some environmental principles more than others, in different regulatory areas, whether it is the extensive body of public health cases involving the precautionary principle, or involving the polluter pays principle in relation to schemes of environmental regulation.

Finally, there are a series of anomalous and outlying cases in this doctrinal map, which demonstrate that this Chapter's legal analysis is but one way of viewing the case

law, and not definitive, and that the case law is in a state of evolution. Thus case law involving the sustainable development ‘principle’ is more doctrinally ambiguous; there are cases in which the reasoning of the EU courts suggests (in conflict with others) that environmental principles might constitute free-standing grounds of review; and there are cases in which the courts assume that EU institutions have, or should have, acted on the basis of environmental principles in giving environmental principles doctrinal roles. All of these anomalies suggest how EU case law might develop, but also indicate the basic point that environmental principles take on many different roles (are treated differently by the EU courts) in the cases.

This is a conclusion for environmental law scholarship more broadly – it is not possible to state definitively and generally how environmental principles should and do operate legally. Not only are the legal roles of environmental principles contingent on EU legal culture in this Chapter, but those roles within this legal context are not doctrinally fixed, although trends in reasoning can be observed. This variance in the legal roles of EU environmental principles can also be seen in the range of marginal definitions given to environmental principles in the case law, which arise as an aspect and consequence of their particular doctrinal treatment³²⁴ – a result possible because of the imprecise definitional nature of environmental principles generally.

This variance in the legal treatment and definition of environmental principles in EU law undermines one of the key scholarly hopes for environmental principles in solving *legal* problems in environmental law – that they might unify environmental law.

³²⁴ While environmental principles are generally given marginal definitions sufficient to dispose of the immediate legal question in the cases, in *Pfizer* (n29), the precautionary principle is given more than a discrete substantive definition. It is cast as a guide to exercising policy discretion that embodies procedures of decision-making as well as policy ideas.

While environmental principles have a high profile in EU environmental law, the doctrinal picture presented in this map of the case law suggests something more legally complex than coherence. Similarly, a Dworkinian notion of legal principles fails to account for the diversity of doctrinal roles for environmental principles in EU law mapped in this Chapter. And the map does not indicate that environmental principles are promoting a new body of EU law centred on an environmental ethical philosophy. While the integration principle pushes doctrinal boundaries in EU environmental law, it is EU law doctrines, the jurisdictional and constitutional limits of the EU courts, and the central concept of competence in EU law that fundamentally shape EU environmental law, and the roles of environmental principles within this, rather than any environmental philosophy.

In terms of the potential of environmental principles to solve *environmental* problems in EU law, this is undermined by the limited constitutional role of the EU courts in hearing actions based on environmental principles, and in second-guessing institutional discretion by drawing on environmental principles, as described above. Environmental principles are at base policy ideas, and not legal concepts, which are for EU and Member State institutions to implement with a wide discretion. This is reinforced by the ambiguous case law concerning sustainable development principle, which shows the awkwardness of ascribing grand ‘legal’ identities to environmental principles, no matter how important they are in policy terms. In short, any legal roles for environmental principles can only be determined by a close contextual analysis of legal developments within, and on the terms of, a particular legal culture, as done in this Chapter with respect to EU case law developments.

CHAPTER 5

MAPPING PRINCIPLES OF ECOLOGICALLY SUSTAINABLE DEVELOPMENT IN NEW SOUTH WALES LAND AND ENVIRONMENT COURT CASE LAW

A INTRODUCTION

Environmental principles – or principles of ‘ecologically sustainable development’ (‘ESD principles’) as they are known in NSW law – play an important role in the evolving environmental law doctrine of the NSW Land and Environment Court. As in the European context, these environmental principles are general, imperfectly defined and malleable; however they comprise a different group of environmental principles. ESD principles comprise the precautionary principle, the principle of intergenerational equity, the principle of conservation of biological diversity, and the principle of internalisation of costs (embracing within it the polluter pays principle).¹ Also in contrast to the EU context, environmental principles play fundamentally different legal roles in NSW law. This is because the ambiguity of the principles is met by the unique legal culture of the LEC, and particularly the ambiguous institutional identity of this judicial setting. The LEC is a

¹ Chapter 3(D). As in EU law, they also comprise an expanding group of environmental principles in NSW law, including the ‘sustainable use of natural resources’, ‘principle of intra-generational equity’, and ‘principle of good governance’: *Hub Action Group Incorporated v Minister for Planning* [2008] NSWLEC 116; (2008) 161 LGERA 136 [1],[69].

specialist *environmental* court, which has a novel institutional place in the NSW legal system, and an evolving body of distinctive legal reasoning. The meeting of this ‘open’ judicial setting with open-ended environmental principles has resulted in case law that is legally ground-breaking in NSW law, with the Court giving considerable attention to ESD principles in its reasoning in the last decade. This period has tracked a turn in the Court’s case law, reflecting an increasing confidence on the part of the Court as an institution, and an activist drive to pursue an agenda of sustainability. This Chapter maps this ESD case law to understand how environmental principles operate doctrinally in this different legal context, and then how that doctrinal picture matches up scholarly hopes for environmental principles generally.

From this analysis, environmental principles are again seen as concepts that have a distinct legal identity and construction, which is intimately tied up with the legal culture in which they are employed. Notably, ESD principles are not only dependent on the legal culture of the LEC, but increasingly they define it. This is very different from the treatment of ESD principles in the European courts, in which the principles fit into developing legal doctrines and actions within the wider context of EU law. In the LEC, however, the Court takes advantage of the generality and symbolism of environmental principles so as to set a doctrinal agenda that infiltrates all aspects of its jurisdiction, and thus to make a statement about the nature of law it applies and the identity of the LEC as an institution. ESD principles are thus doctrinal centrepieces in the law applied and developed by the LEC; whereas they are employed more selectively and less comprehensively in doctrinal spaces within EU law, through discrete instances of progressive reasoning by the EU courts. The LEC uses ESD principles to push doctrinal boundaries in NSW law, in a conscious bid to aid

what it recognises as a broader project of developing a ‘global jurisprudence’ in relation to environmental principles.² However, the Court uses this appeal to international law to give authority to its radical reasoning, rather than to indicate that its reasoning follows or constitutes a global form of environmental law; this outward-looking attitude to environmental law internationally is part of the LEC legal culture that shapes its ESD doctrine, along with a range of jurisdictional and doctrinal factors that are particular to the NSW legal system.

The difference in judicial approaches to environmental principles in EU and NSW law means that mapping the doctrinal roles of environmental principles in judicial reasoning is done differently in LEC case law. As in the European context, this mapping exercise tracks the techniques of judicial treatment adopted with respect to environmental principles. However, in the LEC context, this judicial treatment breaks down differently. This is because the Court has a different type of jurisdiction – one referred to it by a range of environmental and planning statutes empowering it to determine legal and administrative questions in relation to environmental matters (broadly understood). For one thing, this means there are no significant (self-imposed) constitutional constraints on its doctrinal use of environmental principles, as in the EU courts. Thus there is no distinct group of ‘policy cases’ involving ESD principles in LEC case law.

Rather, the particular statutory jurisdiction of the Court, its creation as a specialist environmental court, its progressive attitude in relation to environmental protection and

² Briscoe P, ‘Ecologically Sustainable Development in New South Wales’, paper delivered 2 June 2007, 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil [76].

sustainability, and its interpretation of Australian common law doctrine (especially administrative law doctrine) that it must apply, all facilitate widespread doctrinal engagement with ESD principles in its case law. This is done by means of a single, overall doctrinal step: determining ESD principles to be legally required ‘relevant considerations’ in relation to the legal questions put to the Court across all elements of its jurisdiction. The map in this Chapter then breaks down into five categories of progressive judicial techniques by which ESD principles are determined to be legally relevant considerations various ways. These mapping categories do not so much reflect historical progression, although this plays some part, as they do the different progressive techniques used by the Court to infuse its doctrine with ESD principles. Thus the Court interprets relevant ambiguous provisions of the central NSW planning statute that occupies most of its time – the Environmental Planning and Assessment Act³ – to require consideration of ESD principles as mandatory relevant considerations; it also broadens this reasoning to all statutes that have ESD objects, and then to all environmental decision-making undertaken or reviewed by the Court where ESD principles are ‘relevant’; finally, it employs ESD principles doctrinally as relevant considerations across the full range of its jurisdiction.

By this breakdown of mapping categories, the map of LEC ESD case law focuses on different aspects of judicial reasoning technique from those that defined Chapter 4’s map of environmental principles in the reasoning of the EU courts. This difference is guided by the LEC’s deeper and specialised jurisdictional reach into environmental matters and the more extensive doctrinal development of ESD principles in its reasoning. Whereas the doctrinal

³ *Environmental Planning and Assessment Act 1979* (NSW) (‘EPA Act’).

roles of environmental principles in EU judicial reasoning were confined to interpretive and informing legal test cases – reflecting the jurisdictional mandate of the EU courts to interpret EU law and review the legality of action within its scope – the legal task of the LEC is more complex, particularly due to its merits review jurisdiction and the extensive fact-finding this involves. While the Court’s doctrinal use of ESD principles involves steps of reasoning in which the principles guide interpretation of ambiguous legislative provisions or inform legal tests, mapping the case law into such categories would overlook the more complicated and sophisticated doctrinal picture in LEC ESD case law.⁴ This is a picture that demonstrates how the Court employs all reasoning techniques at its disposal to find that ESD principles are legally relevant considerations in various senses, to the point that ESD principles are now implicitly part of the Court’s reasoning processes in deciding all actions before it. ESD principles thereby characterise the evolving nature of environmental law in the LEC, and also define the institutional identity of the Court.

As a result of the mapping exercise in this Chapter, it is also possible to draw conclusions about the roles of environmental principles in environmental law scholarship more broadly. The LEC’s inclination to embed ESD in the Court’s doctrine and its institutional identity brings to mind those theoretical approaches to environmental principles that advocate their founding a new form of law, or at least uniting environmental law, as well as scholarly hopes that legal (particularly judicial) use of environmental principles might assist in solving environmental problems. These scholarly approaches and hopes are

⁴ The reasoning techniques focused on in this Chapter’s map are not the only way of mapping the case law, but they demonstrate how the entire jurisdiction of the Court has become infused with doctrine involving ESD principles.

however limited in explaining LEC ESD case law. In short, the map set out in this Chapter reinforces the conclusion that environmental law scholarship is misdirected to the extent that it promotes universal legal identities for environmental principles, and prescribes legal roles and environmental outcomes in relation to environmental principles in the abstract.

To reach such conclusions, this Chapter proceeds in two stages. First, Section B outlines the nature of the LEC, building on the NSW legal developments set out in Chapter 3 to demonstrate the legal culture in which ESD principles have legal roles. Thus it draws on the Court's history, its unique statutory jurisdiction and powers as a planning and environmental court, and the ambiguous nature of the law it applies, to demonstrate that the Court is a novel form of judicial institution. It is both constrained by doctrinal and institutional connections to the broader NSW and Australian legal system, but also in a remarkably free position to move forward and create a different kind of environmental doctrine through its case law. Both aspects of the Court's identity can be seen in its treatment of ESD principles. The doctrinal openness of the Court is particularly due to its power to hear merits review appeals, which involve the Court hearing appeals from administrative decisions made under environmental and planning legislation and deciding them anew. This jurisdiction places the Court, as a common law judicial institution, in unique and controversial territory, but it is central to its identity as a legal institution, occupying the majority of its time and attention. It is in this open and novel legal landscape that ESD principles take on roles in the doctrinal reasoning of the Court.

Section C then maps LEC reasoning involving ESD principles, adopting five progressive steps with respect to doctrinal ESD reasoning as mapping categories, as described above. Thus the doctrinal roles of ESD principles in LEC case law, in contrast to

those in EU law, are demonstrated. The Chapter concludes by reflecting on the implications of this second mapping exercise for environmental law scholarship.

A caveat should be made before proceeding. As in Chapter 4's map of EU cases, the survey of LEC cases in this Chapter is representative rather than comprehensive. Again, this is due to the sheer volume of cases – there are more than 200 LEC decisions involving ESD principles. Also similarly, this Chapter's doctrinal analysis of ESD principles in LEC case law is not the last word – these legal decisions constitute an evolving body of law.⁵

B ESD PRINCIPLES IN THE NSW LAND AND ENVIRONMENT COURT: A UNIQUE AND DOCTRINALLY NOVEL LEGAL SETTING

The legal roles of ESD principles in LEC case law are shaped by the legal culture, not of NSW law generally, but of the Court in particular and the law it applies. This is because the LEC is unique as a legal institution within the NSW and Australian legal systems. It is a purpose-built specialist environmental court, which sits within the hierarchy of courts in NSW, but is unlike any other court in that jurisdiction, or in Australia for that matter.⁶ The Court is distinctive in terms of its history, composition, procedure, jurisdiction and its evolving doctrine. It occupies an uncharted constitutional place within the NSW system of government. This Section sets out this unique institutional identity, examining four particular features of its legal culture, which generate a doctrinal openness, indeed

⁵ This is particularly so due to recent reforms to the *EPA Act*, which curtail the jurisdiction of the court in planning matters in significant respects: below n31.

⁶ While it is related to a breed of environmental courts established in other Australian states, these are each constructed in slightly different ways in terms of their jurisdiction and powers: below n19 and accompanying text.

willingness, on the part of the Court to embrace ESD principles in its reasoning. These are: the history of the Court's creation as a 'one-stop shop' for environmental and planning disputes in NSW; the Court's idiosyncratic statutory jurisdiction; its progressive ESD agenda; and the ambiguous administrative law doctrine applied and developed by the Court.

These factors are not unrelated and they have provided the Court the opportunity to be bold and innovative in its reasoning, particularly in developing environmental law as a body of doctrine. However, due to the quirks of the Court's jurisdiction, this innovation is not without limit. The Court's decisions on particular issues of 'law' are subject to the supervisory jurisdiction of the NSW Court of Appeal ('NSWCA'), its criminal sentencing decisions to the review of the NSW Court of Criminal Appeal, and its administrative decisions operate subject to Australian common law doctrines of administrative law. Thus the 'environmental law' of the LEC is not quarantined from the legal influences of common law courts to which it is connected in the NSW and Australian court system. In this way, the LEC's progressive doctrine is different from that seen in EU courts, which develop innovative doctrine where there are gaps in EU law. By contrast, the LEC is supervised by other courts and sits within a jurisdiction (of NSW and Australian law) that has a long and much analysed legal history. The innovation of LEC reasoning is thus due to the way it challenges doctrines of this background Australian legal history and framework, as well as to the Court's novel jurisdiction. ESD principles have a high profile in this reasoning, providing fertile ground for examining their legal roles in a context where they are central to a body of innovative legal doctrine.

As in Chapter 4's map of environmental principles in EU law, this Chapter's map of ESD principles in LEC case law can only be understood in light of the elements of the

distinct LEC legal culture outlined in this Section. In particular, the appreciation of what constitutes legal ‘doctrine’ in this setting is quite different, since different types of decisions are made by the Court, by way of more detailed and fact-based reasoning than in the EU courts, and the law it applies is doctrinally open in different ways. As set out in Chapter 1, a doctrinal analysis of judicial reasoning allows a comparative legal study between such different legal systems and courts, but, moving from EU to NSW law, it also requires an adjustment of analytical frame in light of these different doctrinal foundations.⁷ Also in contrast to Chapter 4, the Court’s strong inclination to incorporate ESD principles into its case law is itself a significant element in defining the legal culture of the Court and its identity as a judicial institution. This reflexive relationship between the ESD case law of the Court and its legal culture will be fully demonstrated in Section C, while this Section sets the scene for this judicial contribution to the Court’s culture and identity.

1 History of the Court: One-Stop Shop for NSW Environmental Law

Three features of the history of the LEC demonstrate its uniqueness as a legal institution, with the capacity and opportunity to develop novel legal doctrine: its deliberate but unlikely construction as a court, its amalgamated functions from a range of prior judicial and non-judicial institutions, and its mandate to develop a body of ‘environmental law’ for NSW.

First, the Court was introduced at a time of tribunal creation in Australia, for pragmatic reasons to fill perceived gaps in the system of administrative review of public

⁷ The elements of LEC judicial decisions that articulate and apply its law, by adopting a maxim (in particular, an ESD principle) to justify a decision, are of a different order from those found in EU law.

action. However, significantly, it was constructed differently as a judicial (rather than administrative or executive) institution. Since the 1970s, a wave of generalist and specialist tribunals have been set up throughout Australia to fulfil dispute resolution requirements in respect of administrative decision-making that could not be accommodated in the court system.⁸ In particular, tribunals hear administrative decisions on the merits, which the 1971 Kerr Committee Report signally identified as a gap in Australian administrative law, restricted as it was by common law doctrine to ‘errors of law’.⁹ Merits appeals are an enigmatic phenomenon – quasi-administrative but distinct from administration (as a form of review holding administration to account),¹⁰ and increasingly judicialised.¹¹ They can be described thus:¹²

[In a merits appeal, a tribunal] sits in the place of the original administrative decisionmaker and re-exercises the administrative decision-making functions. The decision of the [tribunal] is final and binding and becomes that of the original decision-maker.

While it is often said that a tribunal ‘stands in the shoes’ of the original decision-maker, its function in a merits appeal is distinct, since it is reviewing administrative decision-making in a different institutional setting with different procedural and jurisdictional powers

⁸ The creation and operation of tribunals is one of the hallmarks of Australian administrative law: P Cane, ‘The Making of Australian Administrative Law’ in P Cane (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Sydney 2004) 323, 331; E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007) 133-4.

⁹ Commonwealth of Australia, *Commonwealth Administrative Review: Committee Report*, Parl Paper No 144 (1971) 3, 91.

¹⁰ Administrative Review Council, ‘Better Decisions: Review of Commonwealth Merits Review Tribunals’ Report No 39 (1995) 11; Fisher, *Risk Regulation* (n8) 134-5; R Creyke, J McMillan and R Reynolds, *Control of Government Action: Text Cases and Commentary* (LexisNexis Butterworths, Sydney 2005) 120.

¹¹ Merits review tribunals in Australia have ‘struggled long and hard to turn themselves into courts’: H Whitmore, ‘Commentary’ (1981) FL Rev 117, 118. See also Creyke, McMillan and Reynolds, *Control of Government Action* (n10) 174-7; P Cane, ‘Understanding Administrative Adjudication’ in L Pearson, C Harlow and M Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008).

¹² LEC, Land and Environment Court of NSW Annual Review 2008, 13.

and subject to different institutional pressures.¹³ Tribunals were deliberately designed to hear such appeals. They were established to do so with affordable and informal procedures, and often with the expertise of lay members specialising in relevant subject areas, so as to create an efficient and effective avenue of challenging administrative decisions.¹⁴ As institutions, tribunals are thus idiosyncratic – they are ad hoc bodies set up by legislation to serve particular adjudicative needs of the time¹⁵ – and they are constitutionally awkward.¹⁶

The LEC was set up in this era of tribunal creation in Australian administrative law, with similar pragmatic motivations and with similar attributes of informal procedures, specialist members, and jurisdiction to hear merits appeals.¹⁷ However, it was established as a court, in a state jurisdiction so that the federal constitutional problems caused by judicial institutions undertaking merits review do not arise.¹⁸ Specialist environmental bodies were

¹³ G Brennan, 'The Anatomy of an Administrative Decision' in R Creyke, J McMillan and R Reynolds (eds) *Control of Government Action: Text Cases and Commentary* (LexisNexis Butterworths, Sydney 2005) 4-5; E Fisher, 'Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Law' in L Pearson, C Harlow and M Taggart (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008) 135-6; P Cane, *Administrative Tribunals and Adjudication* (Hart, Oxford 2010) 182-3.

¹⁴ P Cane and L McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (OUP, Oxford 2008) 220-224.

¹⁵ Creyke, McMillan and Reynolds, *Control of Government Action* (n10) 116-120. G Fleming, 'Administrative Review and the "Normative" Goal - Is Anybody Out There?' 28 FL Rev 61, 65.

¹⁶ Tribunals occupy an uncomfortable place between the administrative and judicial arms of government, particularly at the Federal level where they are firmly part of the executive branch of government, due to the constitutionally entrenched separation of powers, which prevents questions of law being decided by non-judicial bodies and remaking of administrative decisions being undertaken by courts: *R v Kirby; ex p Boilermakers' Society of Australia* (1956) 94 CLR 254; P Cane, 'Merits Review and Judicial Review-The AAT as a Trojan Horse' 28 FL Rev 213.

¹⁷ *Land and Environment Court Act 1979* (NSW) ('LEC Act'), ss 12, 17-19, 38. See P Ryan, 'Court of Hope and False Expectations: Land and Environment Court 21 Years On' 14(3) JEL 301, 302. The current Chief Judge has noted that 'the court operates as a form of administrative tribunal' in exercising its merits review jurisdiction: B Preston, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' 25(6) Environmental and Planning Law Journal 385, 387.

¹⁸ Cf n16; Fisher, 'Legal Construction of Merits Review' (n13) 330. The Court was uniquely and pragmatically 'engineered to meet the specifications of its domestic jurisdiction': M Pearlman, 'The Land and Environment Court of New South Wales a Model for Environmental Protection' 123 Water, Air and Soil Pollution 395, 396.

also established in other Australian jurisdictions, some as tribunals and some as courts,¹⁹ but the LEC was the only one established as a superior court of record.²⁰ In the NSW court system, the Court has equivalent status to the Supreme Court of New South Wales.²¹ It is composed of Judges, who have the same rank, title, status, precedence, remuneration and other rights as ordinary Judges of the NSW Supreme Court,²² as well as specialist Commissioners, appointed to the Court for their particular expertise in areas of environmental or planning.²³ The significance of the Court's judicial status is that it imbues it with legal authority and a legal identity of some sort. It might be unconventional, particularly in light of the historically 'non-judicial' task of merits review with which it is charged, but its status as a court means something legally. Thus former Chief Judge Pearlman has commented that:²⁴

[o]ne of the most important features of the Land and Environment Court is that it is a court. It is part of the administration of justice and its role is to carry out functions which courts conventionally undertake in the adjudication and resolution of disputes and in the prosecution of offenders... It acts, as all courts do, independently and according to law. The most obvious function of the Court is therefore to apply the law...

¹⁹ Fisher, *Risk Regulation* (n8) 134-5.

²⁰ *LEC Act*, s5(1). As a superior court of record, the LEC sits at the top of the hierarchy of trial courts in NSW and has inherent jurisdiction, albeit limited by statute in terms of subject-matter, so that it has power, inter alia, to control its own procedures and to prevent abuse of its processes. It has powers of judicial review, appellate review (of summary criminal judgments and questions of law in merits review decisions), and the power to grant equitable remedies, such as injunctions and declarations, in civil enforcement cases, although these only go as far as the *LEC Act* dictates.

²¹ The NSW Supreme Court is the highest court in NSW, a superior court of record which has unlimited 'general' civil jurisdiction and handles serious criminal matters. The Supreme Court sits at the top of the NSW court system, hearing the most important civil and criminal cases, appeals from lower state courts, and exercising federal judicial power where that has been conferred on it by Commonwealth legislation.

²² *LEC Act*, ss7-9.

²³ *LEC Act*, s12.

²⁴ Cf P Stein, 'Specialist Environmental Courts: the Land and Environment Court of New South Wales, Australia' 4 Env LR 5, 7; Preston, 'Operating an Environment Court' (n17) 406.

However, considering the unorthodox legal functions and processes of the Court, and its unique status as a judicial institution in NSW, it is not obvious what this ‘law’ is that it must apply, leaving space for original doctrinal (and procedural) development by the Court. As the then Minister for Planning and Environment, Minister Landa, explained in introducing the *Land and Environment Court Bill* in 1979:²⁵

The court is an entirely innovative concept bringing together in one body the best attributes of a traditional court system and a lay tribunal system. [It] will be able to function with the benefits of procedural reform and lack of legal technicalities... The court will establish its own body of precedents on major planning issues, precedents sorely sought by councils but [currently] totally lacking...

The second historical feature that resulted in the Court’s unique institutional nature was its creation as a body to rationalise the previously fragmented NSW planning and land use system,²⁶ which was procedurally cumbersome, particularly as it involved litigation inefficiencies between different courts,²⁷ and also particularly between tribunals (or boards) and ‘supervising’ courts,²⁸ where the latter alone were responsible for resolving issues of ‘law’, whereas the former decided land use disputes on the merits. This structural reservation of questions of ‘law’ for judges reflected constitutional assumptions built into the NSW legal system about what was the proper and protected role of the judicial branch of

²⁵ Landa DP, New South Wales Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 1979, at 3355.

²⁶ This system included appeals from land valuation, building and subdivision controls and development assessment. The creation of the Court was part of a package of reforms to rationalise this system, which included introduction of comprehensive new planning legislation – the *EPA Act*. For accounts of the complexity of the environmental and planning legislation before 1979 and the system of Courts, Boards and Tribunals that the LEC replaced, see Ryan, ‘Court of Hope and False Expectations’ (n17) 302-5; Z Lipman, ‘The NSW Land and Environment Court: reforms to the Merit Review Process’ 21 *Environmental and Planning Law Journal* 415, 415; Edgar thesis, 20-22.

²⁷ For example, the complicated interaction between the NSW Supreme Court and former Land and Valuation Court when a valuation appeal also involved a question of legal title to property: Ryan, ‘Court of Hope and False Expectations’ (n17) 306.

²⁸ *Ibid* 305-8.

government.²⁹ However, the distinction between legal and non-legal issues in the previous labyrinthine land use system was found to be counter-productive and unworkable, and was cast aside in the construction of the Court. This set the scene for a court that was constitutionally unique in having responsibility for deciding all aspects of land use appeals.³⁰ The Court was a ‘one-stop shop’ for deciding disputes in relation to land use and planning,³¹ as well as disputes arising under newly enacted legislation concerned with environmental protection.³² While the Court has strong roots as a planning court, its creation and evolution corresponded with an increased focus on environmental protection in NSW legislation, giving a broader dimension to its identity as an ‘environmental court’. The Court was designed to play a vital role in judicially interpreting this new legislation and its operation.³³ It has an important judicial function in interpreting and applying a new body of NSW law.

Following on from this, the Court was seen to have a mandate to develop a body of NSW environmental law. This body of law was ‘environmental’ in the jurisdiction-specific sense of including a strong focus on planning and land use issues, but the creation of the Court marked an opportunity to develop ‘its own body of precedents’, as described by

²⁹ Above n18 and accompanying text.

³⁰ There were those who criticised the development of a court that could decide issues beyond those that were strictly ‘legal’ in the Diceyan tradition: Lipman, ‘The NSW Land and Environment Court’ (n26) 416.

³¹ However, note that recent reforms to the *EPA Act* have undermined the court’s exclusive control over planning appeals, introducing *new* reviewing bodies to provide ‘non-legislative’ review options and undermining this historical purpose of the court: *Environmental Planning and Assessment Amendment Act 2008* (NSW); L Pearson and P Williams, ‘The New South Wales Planning Reforms: Undermining External Merits Review of Land-Use Decision-Making?’ 26 *Environmental and Planning Law Journal* 19, 23.

³² The Court’s creation corresponded with a growing body of specialised legislation in the area of environmental protection as well as planning, which confer jurisdiction on the Court, eg *National Parks and Wildlife Act 1974* (NSW) (‘NPWA’); *Protection of the Environment Administration Act 1991* (NSW) (‘POEA Act’); *Threatened Species Conservation Act 1995* (NSW) (‘TSC Act’).

³³ Landa DP, New South Wales Legislative Council, *Parliamentary Debates (Hansard)*, 21 November 1979, at 3355.

Minister Landa above,³⁴ and to develop ‘coherent and consistent principles’ in the ‘administration of environmental law’. Before the founding of the LEC, there ‘was no environmental law as we now know it’ in NSW law.³⁵ Now there is, and the activities and judgments of the LEC are the primary mechanism for, and evidence of, the development of this ‘special jurisprudence’.³⁶ Thus, as the first specialist environment court established as a superior court of record in the world, it provides an ‘instructive case study’ for how environmental law can develop in such a setting.³⁷

2 The LEC’s Fragmented Jurisdiction, Powers and Progressive ESD Agenda: Sum of the Court Greater than its Parts

The LEC’s opportunity to develop innovative judicial doctrine is explained not only by historical factors, but also by the idiosyncratic nature of its jurisdiction, its distinctive procedural powers, and its progressive ESD agenda. These elements of the Court’s legal culture combine to define the precise legal context in which the Court’s environmental law doctrine, based on ESD principles, can and does develop.

The Court’s jurisdiction is statutory and exclusive.³⁸ It is the only judicial forum in NSW for hearing a wide range of disputes that relate to environmental and planning issues,³⁹

³⁴ Above n25 and accompanying text.

³⁵ Preston, ‘Operating an Environment Court’ (n17) 387.

³⁶ D Cowdroy, ‘The Land and Environment Court of New South Wales - A Model for the United Kingdom?’ [2002] JPEL 59, 78.

³⁷ Preston, ‘Operating an Environment Court’ 387.

³⁸ *LEC Act*, s16. Proceedings wrongly started in other courts are transferred to the Court: *LEC Act*, s72; *Civil Procedure Act 2005*, s149B.

³⁹ Non-judicial forums exist for planning matters, from internal review by consent authorities under s82A *EPA Act*, to review by recently created planning arbitrators, a Planning Assessment Commission and other specialist

giving it the platform to control the evolution of environmental law in NSW. The jurisdiction is statutory in that the Court was established by the *Land and Environment Court Act 1979* (NSW) (*LEC Act*), and the scope of its jurisdiction is there specified, by breaking down its workload into different classes. These include merits appeals from a range of environmental and planning decisions (Classes 1, 2 and 3),⁴⁰ judicial review actions and civil enforcement of planning provisions and environmental offences (Class 4),⁴¹ and criminal matters (Classes 5, 6 and 7).⁴² These different classes include the Court sitting as an appellate court in some cases,⁴³ and they are governed by different rules as to the composition of the Court and its procedure. Thus some matters are reserved for the Judges of the Court alone, including undertaking Class 4 judicial review and civil enforcement actions,⁴⁴ presiding over criminal trials and appeals in relation to environmental offences,⁴⁵ and hearing ‘questions of law’ that arise during merits appeals.⁴⁶ Merits appeals, however, can be heard by specialist Commissioners as well as Judges.⁴⁷

It is merits appeals, as well as Class 4 judicial review actions, that make up most of the Court’s ESD case law. The nature of merits appeals is again based in statute. The

panels: above n31. These bodies either add layers to the appeal process, or remove jurisdiction for appeals to the LEC on some matters altogether: Pearson and Williams, ‘NSW Planning Reforms’ (n31) 20-25. It remains unclear how these reforms will affect the development and administration of NSW planning law.

⁴⁰ *LEC Act*, ss17-19.

⁴¹ *LEC Act*, s20. ‘Civil enforcement suits’ are brought on the basis of open standing provisions in environmental legislation, eg *EPA Act*, s123.

⁴² *LEC Act*, ss21-21B.

⁴³ Eg in Classes 4 and 6.

⁴⁴ *LEC Act*, s33(2).

⁴⁵ *Ibid*.

⁴⁶ *LEC Act*, s56A. See also *Land and Environment Court Rules 2007*, Part 3, Rule 3.10, restricting the procedural directions that a Commissioner of the Court can make.

⁴⁷ *LEC Act*, s33(1).

Court's power to undertake such appeals is prescribed by section 39 LEC Act, demonstrating the extensive discretion afforded to the Court in hearing such appeals:

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.

This provision also indicates why the LEC case law can be so different from that of the EU courts: in merits appeals, the LEC decides cases finally, with extensive fact-finding powers, and in the place of administrative decision-makers. It thus applies legal doctrine and statutory frameworks, rather than only interpreting them, or testing the legality of action by other institutions. The LEC determines the law and applies it to the facts in merits appeals.

A different *LEC Act* provision empowers the Court to hear judicial review actions, connecting them to the administrative law jurisdiction of the NSW Supreme Court, but defining this jurisdiction differently by reference to the environmental and planning remit of the Court:⁴⁸

(2) The Court has the same civil jurisdiction as the Supreme Court would, but for section 71 [which prevents the proceedings here listed from otherwise

⁴⁸ *LEC Act*, s 20(2).

being brought in the Supreme Court], have to hear and dispose of proceedings:

...

(b) to review, or command, the exercise of a function conferred or imposed by a planning or environmental law...

In terms of procedure, while the Court has deliberately informal rules (including as to evidence), governing merits appeals,⁴⁹ statutory and common law rules of procedure and evidence apply in the Court's judicial review jurisdiction, as they do in NSW courts generally.

This composite jurisdiction of the Court is further fractured by the 59 environmental and planning statutes that confer particular jurisdiction on the Court within its various jurisdictional classes,⁵⁰ and they do so differently. Thus some statutes may provide avenues of appeal to the Court by way of judicial review but not merits review.⁵¹ While there were initially perceived to be arbitrary environmental 'gaps' in the subject-matter covered by these jurisdiction-conferring statutes,⁵² their coverage of 'environmental' issues is now relatively comprehensive,⁵³ particularly since they are increasingly concerned with environmental protection as well as planning.⁵⁴ Thus the Court is charged with hearing matters that relate to pollution, waste, national parks, habitats and threatened species, fisheries, water

⁴⁹ So it might deal with them efficiently and adduce expert assistance as necessary: *LEC Act*, s38.

⁵⁰ These statutes range from the *Aboriginal Land Rights Act 1983* (NSW) to the *Encroachment of Buildings Act 1922* (NSW) to the *EPA Act* and *TSC Act*. A full list can be found at <www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_jurisdictionlegislation> accessed 1 October 2010.

⁵¹ Eg decisions under *NPWA*, s90 (concerning consent to destroy Aboriginal objects); Minister's water management plans under the *Water Management Act 2000* (NSW), s50; and planning consent decisions for major infrastructure projects under Part 3A *EPA Act* where they are either 'critical infrastructure projects', proposed by a public authority and/or have been reviewed by the Planning Assessment Commission: ss75K and 75L.

⁵² Ryan, 'Court of Hope and False Expectations' (n17) 303.

⁵³ To the extent it is possible to define what 'environmental' issues are: Chapter 2, n12.

⁵⁴ Above n32.

management, mining, cultural as well as built heritage, in addition to the natural environmental aspects in relation to the planning of the built environment. Further, this legislation is now linked by the common purpose of promoting ‘ecologically sustainable development’, which is found in objects clauses of most of these Acts.⁵⁵

This linking of the Court’s fragmented statutory jurisdiction can be seen in other ways. Thus the procedural and evidential rules of the Court in its different Classes are not as distinct as the *LEC Act* appears to prescribe. In its merits review jurisdiction, the Court has found that, while it may adopt a flexible approach to evidence-taking, the ‘underlying principles’ of the law of evidence remain relevant, so that the court is bound by the rules of natural justice and may not make arbitrary decisions.⁵⁶ Similarly, the LEC has adopted highly prescribed rules of procedure to promote efficient and fair case management,⁵⁷ formalising the Court’s processes.⁵⁸ At the same time, the rules of procedure across all judicial proceedings in NSW (including both judicial and merits review in the LEC) are now also governed by the *Civil Procedure Act 2005*, which is designed to facilitate the ‘just, quick and cheap resolution of the real issues in the proceedings’,⁵⁹ so that the procedural

⁵⁵ And defined by reference to the common ‘definition’ of ESD principles in *POEA Act*, s6(2): Chapter 3, text accompanying nn223-225.

⁵⁶ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 67; *Tim Unity Holdings v Randwick CC* [1998] NSWLEC 96.

⁵⁷ *Land and Environment Court Rules 2007*; range of Notes and Directions in the Court’s Practice Collection: <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practicedirections> accessed 1 October 2010.

⁵⁸ This formalising of rules of procedure and evidence reflects the judicialisation of administrative tribunals: above n11.

⁵⁹ *Civil Procedure Act 1995* (NSW) (‘CPA’), s56(1). The LEC has recently subscribed to the CPA, and its *Uniform Civil Procedure Rules 2005* (NSW), which now binds all NSW courts. The *Land and Environment Court Rules* do however prevail over the uniform rules: Uniform Rules, r 1.7, Sch 2.

approach to merits appeals is not particularly different from other LEC (or NSW) civil proceedings.

These purposive and procedural connections across the Court's jurisdiction set the scene for the LEC to make connections across its case law and to build a body of doctrine involving ESD principles. Further, and particularly in relation to merits review and judicial review cases, the Court has doctrinal flexibility in working out how to implement the unique and open statutory provisions setting out these two aspects of its jurisdiction.⁶⁰ This flexibility is discussed further in the following sub-Section.

There are two further aspects of the Court's jurisdiction that lay the foundation for doctrinal innovation involving ESD principles across the Court's jurisdiction. First, the distinct Classes of its jurisdiction are not as disparate as they might appear. This is because the majority of the Court's cases are merits appeals,⁶¹ or arise out of the *EPA Act*,⁶² giving an effective consistency to the Court's case law. And it is also because the various actions heard by the Court across its jurisdictional classes are public law actions in a broad sense (including criminal cases and merits appeals), which have an interconnected subject-matter. This connection, and the consequent opportunity for developing environmental law doctrine,

⁶⁰ Above n47-48 and accompanying text.

⁶¹ Merits appeals in Classes 1-3 of the Court's jurisdiction (appeals from environmental and planning decision-making, tree disputes, and land tenure, valuation and compensation claims) take up approximately three-quarters of the Court's caseload: LEC, Land and Environment Court of NSW Annual Review 2008, 24.

⁶² Such appeals are generally brought by disappointed planning applicants against local government authorities in relation to development consent decisions: *EPA Act*, s97. This includes applicants disappointed by 'deemed' refusals of planning consent under s82(1), ie cases where a consent authority has not determined a development application within the required period prescribed by the Act's regulations.

has not been lost on commentators and judges of the Court. Thus a former Judge has reflected:⁶³

The administration of environmental law, whether based on statute or common law, is a matter of enormous consequence to the future well-being of our planet, as well as of crucial significance domestically. To the extent that much of it comprises public law and results in litigation (often between a citizen or group and the Crown, a Government instrumentality or corporation), it is important that the courts are able to respond with the development of coherent and consistent principles, as well as efficient and effective case management. My thesis is that a well qualified specialist court, with exclusive jurisdiction in all matters environmental, has the best chance of succeeding.

This quotation demonstrates the second reason why the LEC's jurisdiction might be seen as a whole, greater than the sum of its jurisdictional parts, which establishes a legal forum for developing innovative legal doctrine: a progressive environmentalist agenda. This agenda can be seen in the Court's history – the LEC was created as a 'bold answer to calls for the protection of our built and natural environment'.⁶⁴ And it has matured with the Court's evolution. The current Chief Judge of the Court, Preston CJ, has commented that a 'unifying ethos and mission' has developed over the Court's 30-year history.⁶⁵

Court personnel (judges, commissioners, registrars and court staff) all believe they are engaged in an important and worthwhile endeavour [ie the protection of the environment for the public in general]; the court and its work matter and are making a difference. They view themselves as part of a team; not as individuals working independently. There is an "esprit de corps".

This environmentalist agenda is pursued, through the developing doctrine of the Court, in terms of 'ecologically sustainable development' and ESD principles. Thus Preston CJ has

⁶³ As quoted in M Grant, Dept of the Environment, Transport & Regions (UK), *Environment Court Project Final Report* (2000) ('Grant Report'), 424.

⁶⁴ Cowdroy, 'Land and Environment Court of New South Wales' (n36) 59.

⁶⁵ Preston, 'Operating an Environment Court' (n17) 408.

observed that the Court's institutional attributes – its specialism, comprehensive jurisdiction and 'interdisciplinary' decision-making – make it 'best placed' to develop innovative and holistic remedies and solutions to environmental problems through its jurisprudence, and thus play a role in achieving ESD.⁶⁶ As will be seen in Section C, ESD principles in LEC case law are used as vehicles for this environmentalist spirit of the Court.

In sum, the statutory construction of the Court – with its exclusive and novel jurisdiction establishing a one-stop shop for disputes involving environmental and planning matters in NSW – along with its environmentalist agenda, combine to create a unique judicial institution with a distinct legal culture, which has the opportunity and inclination to create new legal doctrine involving environmental principles. This opportunity is one that the Court is conscious of, as Preston CJ states:⁶⁷

The court has shown that an environmental court of the requisite status has more specialised knowledge, has an increased number of cases and hence more opportunity to, and is more likely to, develop environmental jurisprudence... Large, established courts can be conservative and have inertia; change is slow and resisted. The fact that this court is a separate court has enabled flexibility and innovation.

3 Ambiguous Administrative Law Doctrine

The third aspect of the LEC's legal culture that provides the Court with an opportunity to develop innovative doctrine involving ESD principles is the ambiguity of the administrative law doctrine it applies. While the Court sits within the Australian legal system, so that it is bound to apply common law doctrines, including of administrative law (particularly judicial

⁶⁶ Ibid 385-6.

⁶⁷ Ibid 407-9.

review doctrine), it is also a court whose jurisdiction is uniquely constructed by statute, as seen above. Thus any relevant common law doctrine must be accommodated within this jurisdictional framework. There are two particular features of the administrative law doctrine applied by the Court that provide scope for the Court's doctrinal innovation: the openness and awkwardness of common law judicial review tests applied by the Court, and the novel space for doctrinal development provided by merits appeals. The former tests (of common law judicial review) are the subject of much administrative law case law and scholarship in Australian law,⁶⁸ and the latter (merits review) relatively little, at least explicitly.⁶⁹ However, both make up the distinctive administrative law of the Court, with 'administrative law' understood to include both judicial and merits review of administrative decisions.⁷⁰ The focus of this Chapter's analysis is on this body of administrative law of the LEC, since it contains the key doctrinal developments involving ESD principles in LEC reasoning.

As for judicial review doctrines applied by the Court, section 20(2) *LEC Act* directs that the Court has the same jurisdiction as the NSW Supreme Court in reviewing or commanding the exercise of a function conferred by an environmental or planning law (that refers such jurisdiction to the Court), and, as a NSW court, the LEC is bound to apply common law doctrines of administrative law in doing so. These include *Wednesbury*

⁶⁸ Eg M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th edn, Lawbook Company, Pyrmont 2009) Ch 1; W Lane and S Young, *Administrative Law in Australia* (Lawbook Co., Pyrmont 2007) Ch 1.

⁶⁹ Fisher, 'Legal Construction of Merits Review' (n13) 325-332; cf environmental law scholars who treat merits review decisions as part of Australian *environmental law* as a matter of course and intense interest: below n85.

⁷⁰ Merits appeals are included since they involve appeals from, and remaking of, administrative decisions by a court.

unreasonableness, procedural unfairness, failure to take into account relevant considerations, acting with improper purpose, and so on.⁷¹ These various doctrines are all properly argued and considered in the Court's Class 4 jurisdiction,⁷² but it is the common law test of failure to take into account mandatory relevant considerations that is of primary significance in the doctrinal use of ESD principles in LEC cases.

This judicial review doctrine constitutes a relatively open doctrinal space for implicating environmental principles as legally required 'relevant considerations' in LEC law, and so justifying LEC decisions.⁷³ This is because the authoritative High Court statement of this common law doctrine provides that relevant considerations, which a decision-maker is obliged to take into account, are to be determined by the particular statutory context in which challenged administrative decisions are made, so that if relevant considerations are not set out explicitly in such legislation, they are to be implied from its 'subject-matter, scope and purpose'.⁷⁴ Determining mandatory relevant considerations for the purposes of judicial review is thus a matter of statutory construction and purposive inquiry, giving the court discretion in applying this doctrine. In the case of the LEC and its particular jurisdictional remit, this discretion is shaped by the statutes that confer jurisdiction on the Court, as well as the progressive ESD agenda pursued by the Court in interpreting

⁷¹ Creyke, McMillan and Reynolds, *Control of Government Action* (n10), Part C.

⁷² Eg *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2004] NSWLEC 122; *Anderson v Director-General, Department of Environment and Conservation* [2006] NSWLEC 12; (2006) 144 LGERA 43.

⁷³ For the general manipulability of Australian judicial review doctrines, see M Taggart, "'Australian Exceptionalism" in Judicial Review' 36(1) FL Rev 1, 27-29.

⁷⁴ *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 39-40.

their provisions and subject-matter, scope and purpose. In this way, this judicial review doctrine, as applied in LEC cases, is adapted to reflect the legal culture of the Court.⁷⁵

This administrative law doctrine has pivotal doctrinal significance in LEC ESD case law for two reasons. First, while its application strictly depends on the particular statutory framework in which an impugned administrative decision is made, the LEC has developed a variety of progressive judicial techniques for finding ESD principles to be legally required relevant considerations in its case law, building on, and beyond this administrative law doctrine, so that these principles are effectively found to be relevant considerations justifying the Court's reasoning across the jurisdiction of the Court generally. Despite an attempt by the NSWCA, in its supervisory role hearing appeals on questions of law (including judicial review decisions) from the LEC, to overrule this enthusiasm of the Court to impute ESD principles as mandatory relevant considerations (here under the *EPA Act*),⁷⁶ Hodgson JA has conceded that:⁷⁷

...the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act bona fide in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions.

Thus the common law doctrinal limits imposed on the LEC by appellate courts are not only modest with respect to its evolving ESD doctrine, but they can themselves be

⁷⁵ Eg *Carstens v Pittwater Council* [1999] NSWLEC 249; (1999) 111 LGERA 1; *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258; *Walker v Minister for Planning* [2007] NSWLEC 741; (2007) 157 LGERA 124.

⁷⁶ Finding that ESD principles must also be 'relevant' on the facts of a particular impugned decision – a judgment for the relevant administrator to make, not a judicially reviewing court: *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 [54]-[55].

⁷⁷ *Ibid* (emphasis added).

influenced by the Court's innovative ESD reasoning in working out its idiosyncratic and context-specific judicial review doctrine.

The second way in which the open and ambiguous doctrine of mandatory relevant considerations has been central to LEC doctrine involving ESD principles is through its application in merits appeals. At common law, it is dogma that courts, in undertaking judicial review, must never stray into evaluating or deciding the merits of a decision.⁷⁸ This is a particularly difficult distinction for a court to draw in determining whether a decision-making has failed to take relevant considerations into account – how is a court to decide whether a relevant matter was taken into consideration without investigating the merits of the decision?⁷⁹ The common law compromise is that a judicially reviewing court must consider whether the relevant administrator gave ‘proper, genuine and realistic consideration’ to the matter,⁸⁰ with the qualification that this formulation does not allow a court to assess the adequacy of that consideration.⁸¹ While common law doctrine agonises over this hair-splitting distinction between judicial review and merits review in relation to the ground of relevant considerations,⁸² the jurisdiction of the LEC creates a judicial setting whereby the Court is not only allowed, but required, to undertake merits review.

In this setting, orthodox administrative law principles at common law run out, in that they fail to characterise the legal nature of merits appeals undertaken by a court. Further, the

⁷⁸ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 38; *Peko-Wallsend* (n74) 41.

⁷⁹ Taggart, ‘Australian Exceptionalism’ (n73) 27-8.

⁸⁰ *Weal v Bathurst CC* [2000] NSWCA 88; (2000) 111 LGERA 181 [9].

⁸¹ *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGERA 277 [79].

⁸² M Gleeson, ‘Judicial Legitimacy’ (2000) 20 *AustBarRev* 4, 11. Similar difficulties affect English administrative law: T Endicott, *Administrative Law* (OUP, Oxford 2009) 267-8.

very distinction between judicial review and merits review is challenged in LEC decisions. This is because, while there is a distinction between judicial and merits review actions in the different jurisdictional Classes of the Court, its reasoning between decisions across these Classes overlaps, as will be seen in Section C.⁸³ This is particularly so in relation to the doctrine of mandatory relevant considerations, since in both types of action the Court needs to determine which considerations are legally required and relevant, before determining whether they were considered, or alternatively considering them, in judicial review and merits review actions respectively. Such reasoning in merits appeals demonstrates that these decisions have doctrinal implications, to the extent that they involve the Court determining what are legally required relevant considerations, before considering them on the facts. In addition, it demonstrates how ambiguous administrative law doctrine is shaped by the unique legal jurisdiction and culture of the Court to represent a particular form of environmental law in the LEC.⁸⁴

The doctrinal implications of merits appeals in LEC reasoning might be more boldly stated – they are a largely untapped resource of administrative law doctrine. While Australian environmental law scholars presume that LEC merits appeals constitute precedent

⁸³ Particularly in cases where a judicial review action is brought to challenge a decision when no merits appeal is available: *Gray* (n75); *Walker* (n75).

⁸⁴ To the point that some commentators describe the Court's judicial review and merits review decisions as it is 'judicial review work': J Cripps, 'Administrative Law' in T Bonyhady (ed) *Environmental Protection and Legal Change* (Federation Press, Annandale 1992) 29. Other examples of ambiguous administrative law principles and their evolution into novel LEC doctrine, in light of the Court's unique legal culture (including its specialist expertise), are seen in relation to the 'jurisdictional fact' doctrine (*Timbarra Protection Coalition Inc v Ross Mining* [1999] NSWCA 8; (1999) 102 LGERA 52; *Corowa v Geographe Point* [2007] NSWLEC 121; (2007) 154 LGERA 117; *Providence Projects v Gosford CC* [2006] NSWLEC 52; (2007) 147 LGERA 274) and in determining what are 'errors of law' in LEC decisions amenable to appeal (*Timbarra Segal v Waverley Council* (2005) 64 NSWLR 177 (CA); *Segal v Waverley Council* (2005) 64 NSWLR 177 (CA)).

and are suitable for analysis as Australian ‘environmental law’,⁸⁵ academic appraisal of the legal conceptualisation of merits review is embryonic,⁸⁶ particularly in administrative law scholarship.⁸⁷ However, as Fisher argues, the doctrinal elements of merits appeals, particularly in the LEC, are real and should not be overlooked by legal scholars.⁸⁸ The mapping exercise in this Chapter thus includes the Court’s merits appeals within the scope of its doctrinal analysis, and for two particular reasons. First, these are judicial decisions, in which the LEC relies on maxims (ESD principles as mandatory relevant considerations) to justify its decisions (albeit that these decisions go further than judicial review in terms of making a decision on the facts), thereby satisfying the definition of judicial doctrine.⁸⁹

Second, these decisions are relied on by the Court itself as precedents, justifying subsequent decisions of both judicial and merits review. Thus, the decision in *Leatch*,⁹⁰ in which the Court engaged in innovative reasoning to find the precautionary principle to be a relevant consideration in a planning consent decision, has been relied on in many subsequent

⁸⁵ Eg J Peel, ‘Ecologically Sustainable Development: More Than Mere Lip Service?’ (2008) 12(1) *Australasian Journal of Natural Resources Law and Policy* 1, 12, 27; W Gullett, ‘The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review’ in E Fisher, J Jones and R Schomberg (eds) *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, Cheltenham 2006); M Smyth, ‘Inquisitorial Adjudication: the Duty to Inquire in Merits Review Tribunals’ (2010) 34(1) *MULR* (forthcoming). Fisher points out that this scholarly tendency is supported by widespread publication of merits review decisions by legal publishers: Fisher, ‘Legal Construction of Merits Review’ (n13) 330-1. The LEC has also published decisions of both commissioners and judges on the internet since 2003, with increasingly lengthy reasoning.

⁸⁶ Environmental law scholars remain confused over how to characterise merits review decisions legally: as statements of the ‘common law’ (Pearlman, ‘The Land and Environment Court of New South Wales’ (n18) 405), or as outside the Court’s ‘judicial function’ (Ryan, ‘Court of Hope and False Expectations’ (n17)).

⁸⁷ P Bayne, ‘The Proposed Administrative Review Tribunal – Is There a Silver Lining in the Dark Cloud?’ (2000) 7 *AJAdminL* 86, 89; Fleming, ‘Administrative Review and the “Normative” Goal’ (n15); Cane, *Administrative Tribunals and Adjudication* (n13) 182-188.

⁸⁸ Fisher, ‘Legal Construction of Merits Review’ (n13) 329-332.

⁸⁹ Chapter 1, text accompanying n34.

⁹⁰ Chapter 3, text accompanying nn197-201.

LEC decisions to conclude that the precautionary principle is legally relevant.⁹¹ Further, the precedent-setting quality of merits appeals is an express aim of the Court.⁹² To promote consistency in its decision-making, the Court has built up a bank of merits appeals, characterised as ‘planning principles’, to function as the Court’s doctrine.⁹³ The Court formulates extensive reasoning in particular appeals that offer the opportunity to develop general decision-making guidelines,⁹⁴ with the decided cases then operating as blueprints for future decision-making.⁹⁵ Senior Commissioner Roseth has described such planning principles as ‘general assumption[s] or belief[s] forming the basis of a chain of reasoning’.⁹⁶ With respect to ESD principles, there are two such planning principle cases that apply to guide decision-making under the *EPA Act* – *BGP Properties Pty Limited v Lake Macquarie City Council* in relation to ‘ESD principles’ generally and *Telstra Corporation Limited v Hornsby Shire Council* in relation to ‘ESD and the precautionary principle’.⁹⁷ Both cases are central in the doctrinal development of ESD principles in LEC case law, as examined

⁹¹ Eg *Brunsdon v Wagga Wagga CC* [2003] NSWLEC 168 [116]; *BGP Properties v Lake Macquarie CC* [2004] NSWLEC 399; (2004) 138 LGERA 237 [108].

⁹² Cf Australian tribunals in which there is also a goal to generate consistent decision-making in merits appeals, despite the fact that, as *tribunals*, they are not bound by a common law doctrine of precedent: *Re Ganchov and Comcare* (1990) 11 AAR 468(1990) 19 ALD 541, 542.

⁹³ Since 2003. See Practice Direction No. 17: LEC, Land and Environment Court of NSW Annual Review 2004, 4-5.

⁹⁴ J Roseth ‘Developing Planning Principles’ (2005) Talk delivered at the NEERG Seminar on Planning Principles, Wednesday 27 July 2005 <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> (Access Date)#.

⁹⁵ William classifies these as either ‘process-oriented’ or ‘outcome-oriented’ principles: P Williams, ‘The Land and Environment Court’s Planning Principles: Relationship with Planning Theory and Practice’ 22(6) *Environmental and Planning Law Journal* 401, 404-405.

⁹⁶ Again meeting the Chapter 1 definition of ‘doctrine’. J Roseth ‘Planning Principles and Consistency of Decisions’ (2005) Talk delivered to the Law Society’s Local Government and Planning Law Seminar, 15 February 2005 <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> (Access Date) accessed 30 September 2010.

⁹⁷ *BGP* (n91); *Telstra Corporation v Hornsby Shire Council* [2006] NSWLEC 133; (2006) 146 LGERA 10; (2006) 67 NSWLR 256.

below,⁹⁸ highlighting the deliberate development of doctrine by the Court in its merits review jurisdiction.⁹⁹ This demonstrates that the ‘environmental law’ developed and applied by the LEC involves a novel and evolving doctrinal space, particularly in administrative law terms.

4 Conclusion: Reasons for Doctrinal Mapping of LEC Case Law and Its Distinctiveness

The novelty of this evolving environmental law in the LEC, possible due to the unique institutional construction and jurisdiction of the Court and its consciously progressive agenda to build a body of environmental law doctrine, is a key reason to analyse its development by way of a straightforward doctrinal analysis, along the lines set out in Chapter 1.¹⁰⁰ There is no established scholarly methodology or tradition in NSW or Australian law for examining the case law of the LEC in its entirety, and yet it is a rich legal resource. This is particularly the case in terms of its ESD case law, which is extensive, across all aspects of its jurisdiction. Thus the distinctive legal culture of the Court suggests the doctrinal mapping methodology of this thesis as appropriate. It also determines the meaning and legal significance of the

⁹⁸ Section C(1)&(2).

⁹⁹ The Court remains conscious that such cases do not constitute binding precedent at common law – *Balgownie v Shoalhaven CC* (1980) 46 LGRA 198 – and argues that it does not engage in generalised ‘rule-making’ that is the proper preserve of the legislature in its merits review jurisdiction: B Preston, ‘The Role of Courts in relation to Adaptation to Climate Change’ in T Bonyhady, J McDonald and A Macintosh (eds) *Adapting to Climate Change: Australian Law and Policy* (Federation Press, Annandale 2010), 33-4. However, planning principles and merits appeals *do* have consequences for decision-makers, developers and citizens within the scope of the Court’s environmental and planning jurisdiction, generating obligations with respect to those parties, which can be enforced and challenged in court. Some commentators acknowledge the challenge of creating planning principles that promote consistency but are not ‘binding precedents’ (Pearson and Williams, ‘NSW Planning Reforms’ (n31) 30) and also question the legitimacy of the Court engaging in ‘policy formulation’ in developing these principles: Williams, ‘Land and Environment Court’s Planning Principles’ (n95) 406-8.

¹⁰⁰ Chapter 1(C)(1).

resulting map – Section C’s map only makes sense in terms of the LEC legal culture set out in this Section.

In particular, the idiosyncratic institutional identity of the LEC within the NSW and Australian legal system, along with the Court’s agenda to promote ESD and develop environmental law as a core goal, means that the ESD case law of the Court itself significantly influences the institutional identity of the Court, in a way that is not seen in EU law. EU law doctrine may be shaped by developments involving environmental principles, but not the entire culture of the Court – the relationship between legal culture and doctrine is only one way, and is thus more limited, in the EU context.

Another difference between these respective legal cultures of the EU courts and the LEC, which highlights the distinctive task of doctrinally mapping LEC case law involving environmental principles, is the style of reasoning adopted by the respective Courts. Whereas there were challenges in analysing some EU cases due to the courts’ variable and unhelpfully succinct or convoluted reasoning involving environmental principles, LEC reasoning involving ESD principles is challenging to analyse for different reasons. This is particularly the case in merits review decisions, for three reasons. First, because merits appeals involve remaking administrative decisions, their reasoning involves extensive fact-finding, so that the doctrine involved can be difficult to isolate. Second, this reasoning can be specific to the legislative decision-making scheme from which the appeal arises, so that there are different legal constraints on the Court in undertaking merits review.¹⁰¹

¹⁰¹ *Thaina Town v City of Sydney Council* [2007] NSWCA 300; (2007) 156 LGERA 150 [6]; *Re Coldham; Ex parte Brideson (No.2)* (1990) 170 CLR 267, 230.

And, third, the procedures by which merits appeals are heard can vary considerably. In particular, merits appeals in some planning disputes can also be conducted on-site, where parties agree or where there is no significant impact on neighbouring properties or on the public interest.¹⁰² In such cases, judgments are given orally on site and, while recorded, they necessarily contain shorter and less considered reasons than the written judgments of the Court. As a result, it is a select (although extensive) body of merits review decisions, primarily given by the Judges of the Court (or judge sitting with commissioners) rather than Commissioners sitting alone,¹⁰³ which are mapped for their doctrinal reasoning in Section 3. This is not surprising – it is the more ‘judicially’ reasoned decisions of the Court, particularly those designed to carry precedential weight as planning principles, where doctrinal reasoning involving ESD principles is found.

In summary, despite its mixed jurisdiction and the doctrinal complexity and novelty of merits appeals, as well as the range of statutes granting it jurisdiction, the Court has a significant opportunity to develop doctrinal reasoning involving ESD principles. In fact the Court has ‘a unique opportunity... for a new style of administration of public law’,¹⁰⁴ and for a new style of environmental law. This has been explained in this Section as a consequence of the Court’s unique legal culture, in particular its exclusive jurisdiction and specialism, the common ESD object of the statutes that confer jurisdiction on it, its extensive merits review case law, and its agenda to both develop environmental law precedents and pursue environmental goals. As is seen in the following Section, to date the Court has seized this

¹⁰² *LEC Act*, ss34A-34B.

¹⁰³ Cf n87.

¹⁰⁴ Stein, ‘Specialist Environmental Courts’ (n24) 6.

doctrinal opportunity to generate progressive and connected reasoning involving ESD principles, turning its complex jigsaw of statutory jurisdiction into a platform for the development of a distinctive body of environmental law.

C MAPPING THE ESD CASE LAW

This Section maps LEC case law involving ESD principles. Despite the articulation of the four core ESD principles – precautionary principle, principle of intergenerational equity, conservation of biological diversity, and internalisation of environmental costs – in the Intergovernmental Agreement on the Environment and subsequently in NSW legislation,¹⁰⁵ these environmental principles remained open-textured and legally ambiguous. In this mapping exercise, these open principles meet the unique legal culture of the Court, outlined in the previous Section, to create a novel body of environmental law doctrine.

In this way, both before and after ESD principles were recognised in NSW statutes, the Court has engaged in innovative reasoning involving ESD principles to build a doctrinally progressive body of ESD case law across all aspects of its jurisdiction. In fact, the last decade has produced so many LEC ESD decisions, which treat ESD principles very differently, that it is tempting to question whether ‘any recognisable application of the principles of ecologically sustainable development’ can be isolated.¹⁰⁶ While no consistent and predictable application of ESD principles to particular facts might be identified, there are however doctrinal trends in the ESD case law that can be identified. This doctrinal

¹⁰⁵ Mainly in the objects clauses of statutes: above n55. See Chapter 3, text accompanying nn211-218.

¹⁰⁶ *Corowa* (n84) [81].

development involving ESD principles has been explicitly crafted and deliberately interconnected by the Court, which refers to previous decisions involving ESD principles to justify further progressive doctrinal steps, and (now) identifies ESD principles as central elements of its reasoning in general.

Thus analysing the judicial treatment of ESD principles in LEC cases involves analysing progressive steps of doctrinal development, as well as the discrete reasoning techniques used by the Court with respect to ESD principles in individual cases. The resulting doctrinal map shows not simply categories of different judicial reasoning, but also a progression or extension of doctrinal ESD reasoning across the Court's case law and jurisdiction. Accordingly, this Section maps the treatment of ESD principles in LEC reasoning, not by reference to discrete reasoning techniques, as in Chapter 4 for EU law, but according to the progressive steps adopted by the Court in expanding the doctrinal influence of ESD principles in its reasoning. These steps constitute the five mapping categories of this Section, and they show how the Court has used all available reasoning techniques at its disposal (including using ESD principles to interpret ambiguous legislation and to generate legal tests, as well as implying their legal relevance), to find that ESD principles legally required are 'relevant considerations' in relation to the full range of cases before the Court, building a comprehensive doctrine involving ESD principles across its case law.

In the first mapping category, the Court finds ESD principles to be mandatory considerations in relation to planning consent decisions under the *EPA Act* – the statute most frequently considered by the Court – by employing ESD principles to interpret relevant ambiguous statutory provisions. These planning decisions are both made by the Court (in merits appeals) and legally reviewed by it (in judicial review actions). The doctrinal role of

ESD principles in both actions before the Court is the same, since merits review cases apply the same administrative law doctrine that falls to be determined in judicial review cases. In the second category, the Court finds that ESD principles both inform and generate more particular legal steps in planning consent decisions under the *EPA Act*, so that they are relevant considerations at multiple stages of decision-making under the Act.

In the third mapping category, the Court employs ESD principles as mandatory considerations in relation to decisions under a wide range of statutes that refer jurisdiction to the Court and have ESD objects, progressing the doctrinal role of ESD principles in another sense. In the fourth category, the doctrinal use of ESD principles in LEC cases evolves further so that the Court adopts the principles implicitly as legally required relevant considerations in its reasoning, beyond the legislative frameworks involved, confirming the widespread doctrinal roles of ESD principles in LEC reasoning. Fifth, the progressive doctrinal reasoning in relation to ESD principles is confirmed by the use of ESD principles in all aspects of the Court's jurisdiction, from judicial review and merits review actions, to costs decisions to sentencing decisions in environmental crime cases. Recent statements by the Court confirm that it sees such doctrinal infusion of ESD principles as part of its institutional duty as an environmental court.¹⁰⁷ In sum, these five mapping categories depict a comprehensive body of ESD doctrine in LEC case law, developed through judicial reasoning that has extended its reach in various ways.

¹⁰⁷ Eg *Hub* (n1) [2].

In particular contrast to EU cases involving environmental principles, these mapping categories do not involve any ‘policy cases’.¹⁰⁸ While there were some early LEC cases suggesting that the precautionary principle was a ‘political aspiration’ that had no doctrinal role in the Court’s reasoning,¹⁰⁹ this suggestion has been overturned,¹¹⁰ and overtaken by the tide of progressive doctrinal reasoning involving ESD principles outlined above. There are also cases in which ESD principles are referred to by way of background but are not employed to justify the Court’s reasoning in any way.¹¹¹ These are left out of the mapping exercise.

The fact that there is no significant group of ‘policy cases’ in the LEC’s ESD case law highlights the doctrinal openness of the Court to ESD principles, and its inclination to capitalise on this. To the extent that the LEC feels any need for doctrinal restraint in its reasoning involving ESD principles, this arises in judicial review decisions in which it expressly articulates common law doctrine that it must not investigate the merits of a decision in determining whether an ESD principle, as a mandatory relevant consideration, has been properly considered.¹¹² Rather, the Court must attribute an appropriate amount of discretion to the decision-maker whose decision is under review. At the same time, in order to determine whether ESD principles have been relevantly considered, a judicially reviewing court must particularise their meaning on the facts to determine their relevance and the extent

¹⁰⁸ As defined in Chapter 4(D).

¹⁰⁹ Eg *Nicholls v Director-General of National Parks & Wildlife Service* (1994) 84 LGERA 397, 419.

¹¹⁰ *Port Stephens Pearls v Minister for Infrastructure and Planning* [2005] NSWLEC 426 [54].

¹¹¹ Eg *Blackington v Tweed Shire Council* [2006] NSWLEC 158; (2006) 145 LGERA 160 [16].

¹¹² Eg *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490; (2007) 158 LGERA 349 [123]-[124].

of their (lack of) consideration, giving marginal meanings to ESD principles. This makes the line between considering the merits and applying relevant legal doctrine very fine.¹¹³

This common law limitation of administrative law does not cut off the doctrinal development of ESD principles as relevant considerations, in the way that EU law constitutional limits do in EU cases involving environmental principles. This is particularly because of the extensive number of ESD cases that are merits appeals, in which ESD principles are legally relevant considerations that are considered on the merits. Again, the relevant principles must be given (marginal) meanings on the facts for the Court to ‘consider’ the principle and arrive at a decision on the merits. These ‘marginal’ meanings for ESD principles are generally much lengthier than in EU decisions involving environmental principles doctrinally, since they involve full application of principles to facts, whereas the EU courts’ penetration into factual issues is often limited, either because Member State courts are left to apply the relevant legal conclusion to the facts (in Article 267 TFEU preliminary references), or by their restrained role in legally reviewing the actions of other EU institutions.¹¹⁴

A further complication arises due to the extensive fact-finding involved in merits appeals: isolating doctrinal developments can be difficult. This is particularly so in the case of the precautionary principle. Where found relevant in merits appeals, its consideration results in definitions of the principle that are marginal in that they are fact-dependent, but in

¹¹³ This mirrors the position in EU law that any doctrinal role for a generally-stated environmental principle involves attributing to it a marginal meaning: Chapter 4.

¹¹⁴ Cf CFI decisions eg Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305: Chapter 4(F)(2)(b).

some cases also explicitly doctrinal in that they involve decision-making steps that are intended to constitute precedent for the principle's future application. There are challenges in isolating doctrinal elements in this latter sense in decisions involving complicated factual scenarios where scientific uncertainty is often central, within statutory frameworks that involve multiple decision-making steps and give the Court (as decision-maker) wide discretion, in relation to a principle that is general and ambiguous in meaning. To deal with this difficulty, this Section's map stays focused on the primary mapping tool of this thesis – identifying the techniques of reasoning used by the Court in employing environmental principles to justify its decisions – thus demonstrating that these merits appeals involve more than a 'wilderness' of decisions that turned on their own facts.¹¹⁵ However, the different nature of the cases involved, particularly merits appeals, gives a different complexion to this map from that in Chapter 4. The judicial treatment of environmental principles involved is necessarily different.

The mapping of LEC ESD cases begins with the innovative reasoning employed by the Court in finding ESD principles to be legally relevant considerations in planning consent decisions under the *EPA Act*. The beginnings of this reasoning were outlined in Chapter 3, as part of the derivation of ESD principles in NSW law in the first place,¹¹⁶ and it constitutes the first doctrinal mapping category of the LEC ESD case law.

¹¹⁵ L Pearson, C Harlow and M Taggart, *Administrative Law in a Changing State* (Hart, Oxford 2008) 7.

¹¹⁶ Chapter 3(D)(3).

1 ESD Principles as Legally Relevant Considerations in Determining Planning Consent Decisions under Section 79C *EPA Act*

The initial, and now most prolific, set of cases in which ESD principles have been used to justify the reasoning of the Court are general planning (or ‘development’) consent decisions under the *EPA Act*.¹¹⁷ In these cases, the primary decision-maker is often a local council as the relevant consent authority, even for environmentally sensitive, or so-called ‘designated’, developments, and most cases are merits appeals.¹¹⁸ These cases predominantly involve the precautionary principle being adopted by the Court as a mandatory relevant consideration in deciding planning applications, where relevant, in judicial review as well as merits review actions.

As Australian administrative law doctrine dictates, relevant considerations that a decision-maker is obliged to take into account are to be determined by the explicit or implicit requirements of the statutory framework within which the decision is to be made. In this case, explicit requirements are set out in section 79C(1) *EPA Act*, which prescribes a list of matters to be taken into account, where relevant, by a consent authority when considering applications for development consent under the Act.¹¹⁹ However, the enumerated matters are general and open in their terms, leaving scope for considerable discretion, having evolved

¹¹⁷ These are planning applications decided under Part 4 *EPA Act*; cf planning applications for major infrastructure developments under Part 3A: *EPA Act* below Section C(3).

¹¹⁸ In relation to such designated developments, objectors as well as development proposal applicants have standing to bring merits appeals (*EPA Act*, s98).

¹¹⁹ The LEC is equally constrained to consider these matters in a merits appeal arising from such a decision.

from a longer and less generalised list of matters in ex-section 90(1) *EPA Act*.¹²⁰ They include: any relevant environmental planning instruments ('EPIs'), the likely impacts of the proposed development (including environmental impacts), the suitability of the site for the development, and the 'public interest'. They do not include ESD principles,¹²¹ and, while they are not exhaustive,¹²² their generality leaves a lot of scope for the principles to be drawn on doctrinally by the Court to structure its decision-making, either in informing the listed statutory matters to be considered, or as an additional and implicit relevant matter.

From the earliest case law involving ESD principles, the precautionary principle in particular, the LEC did just this. As set out in Chapter 3, in the early ground-breaking decision *Leatch*,¹²³ Stein J found the precautionary principle to be a required consideration under a different statutory framework – the *National Parks and Wildlife Act 1974 (NSW)* ('NPWA') – which required 'any matter considered to be relevant' to be taken into account in relation to decisions regarding fauna destruction licence applications. Additionally, the *LEC Act* itself provides that, in merits appeals, the 'public interest' should be taken into account. With respect to both these open statutory requirements, Stein J concluded that the precautionary principle was legally required to be considered on the facts of the case, using

¹²⁰ Ex-s90(1) included more detailed matters for consideration in assessing development applications, such as 'the effect of that development on the landscape or scenic quality of the locality' and 'the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of that development': former s 90(1), *EPA Act* (n3). This list was rationalised and amended into its present form in s79C by the *Environmental Planning & Assessment Amendment Act 1997* (date of commencement 1/7/1998).

¹²¹ Note Bignold J's surprise, as far back as 1995, that these listed matters have never included ESD principles: *KA Cox Constructions v Concord Council* [1995] NSWLEC 24.

¹²² *Carstens* (n75) [74].

¹²³ *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270, 282.

the support of international agreements and the IGAE to interpret these statutory provisions in light of the principle.

In *K A Cox Constructions v Concord Council*,¹²⁴ Bignold J drew on Stein J's reasoning in *Leatch* to find that the 'public interest' consideration in s79C *EPA Act* was to be interpreted to include ESD principles (in this merits appeal). This led to an entrenched path of doctrinal reasoning implicating ESD principles as relevant considerations in subsequent cases, confirming that the 'public interest' includes ecologically sustainable development and the principles that characterise it.¹²⁵

After an increasing number of cases in which the precautionary principle, in particular, was adopted by the Court as a relevant consideration in planning consent decisions,¹²⁶ the doctrinal role for ESD principles outlined in *Cox Constructions* was confirmed in two authoritative LEC decisions that interpreted the ambiguous 'public interest' consideration in section 79C(1) to include ESD principles. These were cases that came after 'ecologically sustainable development' was included as an object of the *EPA Act*,¹²⁷ but before this ESD object was defined by reference to its IGAE-like articulation in s6(2) *POEA Act*, highlighting the innovation of the Court's reasoning in interpreting the legal significance of this new statutory object.

¹²⁴ *Cox Constructions* (121).

¹²⁵ Although in some merits appeals, ESD principles were found to be required matters for consideration through other provisions of s79C(1), with the principles being included in a relevant EPI or other policy instrument which the decision-maker was bound to consider, under s79C(1)(a)(i) or (iv): eg *Brunsdon* (n91); *Commonwealth of Australia v Randwick CC* [2001] NSWLEC 79; *Davfast v Ballina Shire Council* [2000] NSWLEC 128; *NSW Glass and Ceramic Silica Sand Users Association Ltd v Port Stephens Council* [2000] NSWLEC 149.

¹²⁶ Eg *Greenpeace Australia v Redbank Power* [1994] NSWLEC 178; (1994) 86 LGERA 143; *Fitzpatrick Investments v Blacktown CC* [1999] NSWLEC 290. Also above n125.

¹²⁷ *EPA Act* (n3), s5.

The first decision was *Carstens v Pittwater Council*,¹²⁸ a judicial review action brought in the Court's Class 4 jurisdiction, appealing a merits review decision by Commissioner Watts below on the question of whether ESD principles must be a factor in assessing a development application under section 79C. In brief reasoning, Lloyd J held that it was not an 'irrelevant consideration' (in the administrative law sense) for a decision-maker to take into account a matter – ESD principles – relating to the objects of the *EPA Act*. Further, a decision-maker must take into account the 'public interest' in section 79C(1)(e), which included giving effect to ESD as an object of the Act.¹²⁹ This judicial review decision thus confirmed the articulation of the legal doctrine in the merits appeal below that ESD principles must be considered a factor in appraising the environmental impact of the relevant development application.¹³⁰

This conclusion as to the legal relevance of ESD principles in planning consent decisions was confirmed and expanded in *BGP Properties v Lake Macquarie City Council*.¹³¹ This was a merits review decision, and it is an authoritative articulation of LEC doctrine because it is a planning principle – the first such decision in relation to ESD principles, demonstrating their increasing significance in the law applied by the Court. In this case, McClellan CJ drew on *Carstens* but engaged in more extensive reasoning to find

¹²⁸ *Carstens* (n75).

¹²⁹ *Ibid* [74].

¹³⁰ Brian Preston, as he then was, was counsel for the respondent council in this case. He later became Chief Judge of the LEC and continued the innovative doctrinal reasoning he argued for in *Carstens* in later cases. The arguments he adduced in *Carstens* included that encouraging ESD was now an explicit object of the Act; ESD principles are relevant to many of the 'generic' s79C categories; the 'desirability of an administrative decision-maker exercising discretionary statutory powers in a way which promotes the objects of the Act'; the facts, which concerned a threatened ecological community; and the acceptance of the relevance of ESD principles to environmental decision-making internationally, nationally and in NSW previously: *ibid* [73].

¹³¹ *BGP* (n91).

that the ESD principles set out in the IGAE were ‘mandatory considerations’ for deciding development consent applications.¹³² His Honour took into account a range of factors in seeking ‘to understand the intention of the Parliament’ when including ESD as object of the Act’.¹³³ These included the increasingly large number of other NSW statutes that use the ‘description’ of ESD, finding that these had a common object in ameliorating the impact of private and government action on the environment.¹³⁴ He also drew on the Rio Declaration and previous international developments (from which ESD principles ‘derived’),¹³⁵ the IGAE (which, while not legally binding on local government authorities, ‘reflects the policy which should be applied unless there are cogent reasons to depart from it’),¹³⁶ and the LEC’s previous case law adopting the precautionary principle as a relevant consideration in determining development consent applications.¹³⁷

These legal influences, in combination, led McClellan CJ to find that the ‘public interest’ consideration in s 79C(1)(e) of the *EPA Act*:¹³⁸

obliges the decision-maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise. This will have the consequence that, amongst other matters, consideration must be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity. Furthermore, where there is a lack of scientific certainty, the precautionary principle must

¹³² Ibid [113].

¹³³ Ibid [85].

¹³⁴ Ibid [87].

¹³⁵ Ibid [90]-[91].

¹³⁶ Ibid [92], citing *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 641, 645. Chapter 3 n186.

¹³⁷ *BGP*(n91) [100]-[112]. McClellan also here referred to the landmark case of the South Australian Supreme Court (on appeal from the Environmental Resources and Development Court in that State) in *Conservation Council of South Australia v Development Assessment Committee and Tuna Boat Owners Association (No 2)* [1999] SAERDC 86, in which the precautionary principle was considered in detail and applied.

¹³⁸ *BGP* (n91) [113].

be utilised. As Stein J said in *Leatch*, this will mean that the decision-maker must approach the matter with caution but will also require the decision-maker to avoid, where practicable, serious or irreversible damage to the environment.

Thus McClellan CJ interpreted section 79C(1)(e) to find ESD principles contained in the IGAE mandatory in considering development consent applications under the *EPA Act*. In doing so, he relied on international and national influences, as well as NSW legal developments. This reasoning does not however demonstrate that this decision simply applies environmental principles derived from international environmental law; rather, it demonstrates that the Court was appealing to a range of relevant sources to give authority to its innovative doctrinal reasoning. It is its legal innovation, rather than a common legal identity for environmental principles, that is so remarkable about this LEC reasoning, which nevertheless remains embedded in the particular inquiry and statutory framework that arose in this case.

Another point of distinction between the ESD principles implicated doctrinally in *BGP* and their manifestations in national or international instruments is McClellan CJ's indication that the LEC would give general ESD principles their own meanings. Thus he elaborates the meaning of the precautionary principle by relying on the previous LEC decision in *Leatch*, supplementing this with an obligation that decision-makers should avoid serious environmental damage. The result is a version of the precautionary principle that is reminiscent of the IGAE formulation but different in emphasis. Further than this, however, McClellan CJ does not give a precise definition of the precautionary principle, or of any other principle, since its application in any planning consent decision will depend on the facts, and thus give rise to marginal definitions, or applications, of the principle. This can be

seen as the precautionary principle gives rise to an array of definitions in LEC planning consent decisions.¹³⁹

By focusing on reasoning techniques rather than definitions of environmental principles, this first mapping category has demonstrated the first stage of doctrinal innovation of the LEC in relation to ESD principles: finding them to be mandatory considerations in Part 4 *EPA Act* planning consent decisions. This innovation was influenced by international and national and policy developments relating to sustainable development, as well as NSW legislative developments, and the precedential force of the Court's own case law. This latter influence confirms that the LEC engages in doctrinal reasoning in its merits review jurisdiction, and that the case law it so generates acts as a form of precedent. Further, the doctrinal crossover in relation to this particular legal issue in both judicial review and merits review cases confirms their respective contributions to the Court's evolving 'environmental law', and thus the suitability of merits review for legal analysis.

2 ESD Principles as Legally Relevant Considerations Informing Decision-making

Steps in Determining Planning Consent Decisions under the EPA Act

This mapping category tracks a second innovative development in LEC reasoning in relation to ESD principles: their use to inform intermediary steps in development consent decisions under the *EPA Act*. There are two key examples of such reasoning, deepening the doctrinal

¹³⁹ These definitions concern both *when* the principle will be relevant on particular facts – ie when there is relevant 'scientific uncertainty' (*Leatch* (n123); *Nicholls* (n109); cf *Vertical Telecoms v Hornsby Shire Council* [2000] NSWLEC 172; *NTL Australia Ltd v Willoughby Council* [2000] NSWLEC 244; cf *Brunsdon* (n91)) – and *how* it will be applied to determine the development application under consideration (*Leatch* (n123); cf *Terrace Tower Holdings v Sutherland Shire Council [No2]* [2002] NSWLEC 150; (2002) 122 LGERA 288; cf *Greenpeace* (n126)).

relevance of ESD principles in LEC case law. Both involve the precautionary principle and they concern decision-making steps that are legally required in determining planning consent applications under Part 4 *EPA Act*, either explicitly in the Act itself when threatened species or habitats are involved (under section 78A(8)), or as implied and generated by the precautionary principle, as a required consideration under section 79C(1). The second example set out in the second ‘planning principle’ involving ESD principles – is the key case in this mapping category, and marks a turning point in the LEC’s ESD case law.

The first example is the Court’s use of ESD principles to inform the issue of whether a species impact statement (SIS) is required for determining a development application under the *EPA Act*. Section 78A(8)(b) explicitly sets out the test for when such an SIS is required: whether a development is ‘likely to significantly affect threatened species, populations or ecological communities, or their habitats’. In a series of LEC cases, involving conflicting expert evidence as to the existence of, or impact of a proposed development on, threatened species or their habitats, the precautionary principle has been used to interpret and inform this openly-stated and ambiguous test.¹⁴⁰ These cases involve a range of actions in which this legal issue has been raised, including judicial review actions, merits review actions, and actions preliminary to merits appeals. Again ESD principles, particularly the precautionary principle, are employed to build LEC doctrine, acting as legally relevant considerations in a different sense – informing whether an intermediary step (producing a SIS) is required in the determination of a development consent applications under the *EPA Act*.

¹⁴⁰ *Cooper v Wollondilly Shire Council* [2004] NSWLEC 145 ; *BT Goldsmith Planning Services v Blacktown CC* [2005] NSWLEC 210 ; *Providence* (n84); *Gales Holdings v Tweed Shire Council* [2006] NSWLEC 85; (2006) 146 LGERA 236, [2006] NSWLEC 212, [2006] NSWLEC 591; *Corowa* (n84).

The reasoning technique used by the Court to extend its use of ESD principles from informing section 79C decisions to the section 78A(8)(b) test involved moving beyond interpreting the ‘public interest’ consideration in section 79C to something broader under the Act. Thus, in *BT Goldsmith*, Pain J found that the *EPA Act* was an Act which adopted the precautionary principle (and all ESD principles) through its objects clause,¹⁴¹ with the consequence that:¹⁴²

the application of the precautionary principle is not merely confined to the final decision as to whether development consent, a license or approval ought be granted. Rather, decision-makers must consider the precautionary principle whenever decisions are being made under an Act that adopts the precautionary principle as is the case here.

Similarly Bignold J, in *Providence Projects*, finds that there is ‘legitimacy’ in applying the precautionary principle to the various decision-making duties imposed by the *EPA Act*, beyond simply determining the final result of development applications.¹⁴³ This is a progressive extension in the legal reasoning of the Court, and is one that is further developed in later mapping categories to give doctrinal force to ESD principles in their own right in LEC decisions.¹⁴⁴

And so the Court uses the principle to inform the test of whether a proposed development is ‘likely to significantly affect’ a threatened species or habitat, so justifying its resolution on the particular facts involved. In this way, marginal meanings are given to the principle, which are highly fact-dependent. In some cases, the principle informs the test by requiring an SIS where there is conflicting evidence about the existence of a threatened

¹⁴¹ *Goldsmith* (n140) [57].

¹⁴² *Ibid* [72].

¹⁴³ *Providence* (n84) [69], [76].

¹⁴⁴ Below Section C(3).

species,¹⁴⁵ or in others, about the impact of a proposed development on a threatened habitat.¹⁴⁶ In other cases again, the principle requires an SIS where there is scientific uncertainty about a development plan to rehabilitate a threatened species,¹⁴⁷ or the principle might only require an SIS where the evidence of potential impact on a threatened species was ‘significant’ or sufficiently ‘weighty’.¹⁴⁸

This fact-dependency in the application of the precautionary principle – in both judicial review and merits review actions – is a result of the institutional identity of the Court which, as a specialist environmental court, resolves technical factual issues on the merits. This does not detract from the doctrinal significance of this case law in applying the precautionary principle to inform the section 78A(8)(b) test; in fact, it constitutes a novel legal development in the Court’s environmental law. This novelty has been highlighted by the Court itself. When confronted with the question of whether LEC SIS actions were akin to ‘ordinary litigation’ rather than merits review (so that a different costs rule should apply), Talbot J found that these cases were more like merits review but struggled to characterise them legally:¹⁴⁹

[It] is not a black and white situation. There are issues of fact and degree, judgement, discretion and balance required to determine whether a species impact statement is required. Ultimately if doubt remains then the precautionary principle applies so that the Court errs on the side of caution. These are not matters that are capable of clear and precise [legal] definition and characterisation.

¹⁴⁵ Eg *Gales* (n140).

¹⁴⁶ Eg *Providence* (n84).

¹⁴⁷ Eg *Gales* (n140).

¹⁴⁸ Eg *Corowa* (n84) [81].

¹⁴⁹ *Gales* (n140) [12].

The NSWCA has similarly struggled to characterise the legal nature of these SIS actions, finding them to involve ‘questions of law’ for the purposes of administrative law oversight at common law, but adapting the administrative law doctrine of jurisdictional fact to the unique nature of the Court (particularly with its expertise in resolving scientific questions in its merits review jurisdiction) to reach this conclusion.¹⁵⁰ Thus common law doctrines of administrative law are altered in the LEC, where resolving legal issues requires the consideration of complex factual scenarios. It is in this novel legal landscape that the precautionary principle has a doctrinal role in this particular mapping category. That role is significant not simply in that it extends the roles of ESD principles into more intricate legal steps in administrative decision-making under the *EPA Act*, but also because it exposes the evolving and novel nature of the ‘environmental law’ in the LEC.

The second and prime example in this mapping category of how ESD principles are used to inform intermediary decision-making steps in relation to *EPA Act* planning consent decisions is seen in the landmark ESD case, *Telstra Corporation v Hornsby Shire Council*.¹⁵¹ This second planning principle case focuses on the precautionary principle in particular. In this case, the Court continued its innovative path for identifying legally relevant ESD principles, building on NSW legislative developments, but embracing an ESD agenda of its own, inspired by extensive international, national and academic sources to move its case law on. In order to justify *Telstra*’s ground-breaking reasoning, Preston CJ considered different (legal and interdisciplinary) scholarly accounts of the precautionary principle, differing

¹⁵⁰ *Timbarra* (n84) [88]-[90].

¹⁵¹ *Telstra* (n97).

applications of the principle in other jurisdictions (including EU law), and different formulations of the principles in various policy contexts, including reliance on the international sustainable development agenda.¹⁵² However, rather than applying all these sources of authority (impossible in any case since they pointed in many different directions in relation to the principles' meaning and application),¹⁵³ Preston CJ used them to give authority and legitimacy to his reasoning. Further, his reliance on international developments reveals how Preston CJ sees this judgment as an important step in applying ESD principles internationally, through which might be realised a 'paradigm shift [to a world] where a culture of sustainability extends to institutions, private development interests, communities and individuals'.¹⁵⁴ Within the LEC, ESD principles thus embody an agenda that motivates the Court's legal reasoning.

In *Telstra*, the Court aims to rationalise its increasing case law involving the precautionary principle in development consent decisions under the *EPA Act* to set a precedent for consistent decision-making applying the principle. In so doing, the Court does not simply find that the precautionary principle is a mandatory relevant consideration under section 79C of the Act, but the principle generates tests, or decision-making steps, that must be met, or undertaken, in properly considering and applying the principle in development consent decisions.¹⁵⁵ This progressive doctrinal step in the Court's reasoning is particular to the precautionary principle, which is ever cryptic in its meaning and also a popular site of

¹⁵² Ibid eg [108]-[112]; [130]-[138]; [144]-[149].

¹⁵³ Not to mention the problems of comparative law methodology this raises: Fisher, *Risk Regulation* (n8) 158. See Chapter 2(C)(2).

¹⁵⁴ *Telstra* (n97) [120].

¹⁵⁵ As a planning principle, it might be categorised as a 'process-oriented' principle: above n95.

controversy and argument in environmental planning disputes, due to the scientific uncertainty inherently involved in so many environmental disputes,¹⁵⁶ and the interminable arguments the precautionary principle invites in its various ambiguous formulations. The decision in *Telstra* further manipulates the ambiguous administrative law doctrine of mandatory relevant considerations, by explicitly moving beyond the common law question of what relevant considerations need to be taken into account in decision-making (and whether this has happened) to examine how that taking into account *should* happen with respect to the generally-stated precautionary principle. The Court's merits review jurisdiction makes this deeper doctrinal inquiry possible, and necessary.

The case itself was a merits appeal from Hornsby Shire Council's refusal to approve, under section 79C *EPA Act*, Telstra's planning application to erect a mobile phone tower in a residential area where there was significant community opposition to its construction, on the basis of suggested harm to human health and the precautionary principle in particular. Having first found that ESD principles in general were required matters for consideration under section 79C's 'public interest' provision, Preston CJ went on to consider the application of the precautionary principle, which had been the basis of objecting to the proposed development. In doing so, his Honour identified two intermediary decision-making steps required by the principle itself. These were separate but cumulative threshold tests that must be satisfied in applying the precautionary principle properly as a mandatory relevant consideration in planning consent decisions. First, there must be a relevant threat of serious or irreversible environmental harm, and second, there must be scientific uncertainty as to the

¹⁵⁶ *Tuna Boat Owners (No 2)* (n137) [22].

environmental damage.¹⁵⁷ His Honour structured these as separate decision-making steps generated by the principle.

Drawing on previous LEC decisions concerning the potential effects of electromagnetic radiation (EMR) on residential dwellings,¹⁵⁸ Preston CJ explained several aspects of this first threshold test: it requires the establishment of both a threat and its seriousness or irreversibility; threats include direct, indirect, cumulative, and long-term threats; assessing seriousness or irreversibility of threatened damage is a complex fact-dependent business that requires considering a range of factors, including interdisciplinary and stakeholder assessment, however it also required a scientific basis that is ‘adequate’.¹⁵⁹ It was this final element of the decision-making step or test required by the principle – the existence of an adequate scientific basis for the purported threat – that was decisive on the facts of this case. Since the proposed mobile phone tower complied with an ‘authoritative and scientifically credible’ EMR standard that it was inappropriate ‘to set aside or disregard’,¹⁶⁰ no threat of serious harm was made out, and the precautionary principle did not apply. This is the doctrinal heart of the decision and it involves the generation of a legal test of ‘adequate scientific evidence’, reminiscent of that in EU law, for the proper application of the precautionary principle as a mandatory relevant consideration in LEC decisions, and the planning consent decisions that it oversees under the *EPA Act*. Preston CJ’s reasoning adapted ‘principles of proper administrative decision-making’ in NSW administrative law to

¹⁵⁷ *Telstra* (n97) [128].

¹⁵⁸ *Ibid* [185].

¹⁵⁹ *Ibid* [134].

¹⁶⁰ *Ibid* [98].

unpack the doctrinal implications of the precautionary principle in this merits review decision – common law principles require that a decision-maker should not act without ‘probative evidence’ in exercising discretion. Such evidence existed in this case, sufficient to dismiss public fear about EMR as ‘irrational’.¹⁶¹

As for the second threshold test – scientific uncertainty – this related to the nature and scope of the threatened environmental harm.¹⁶² However, aside from stating this decision-making step as required, Preston CJ did not elaborate any further doctrine as to its legal application. His Honour discussed a number of different ‘tests’ of scientific uncertainty,¹⁶³ without settling on a specific one. By acknowledging that a range of types of scientific uncertainty exists (including insufficiency of evidence, methodological and technical uncertainty),¹⁶⁴ Preston CJ left this aspect of the precautionary principle to its marginal application in particular cases on their facts, with the only doctrinal requirement being the existence of some form of scientific uncertainty.

Since cases where the evidence is ‘uncertain’, rather than probative, have been the more typical scenario for the application of the precautionary principle in LEC cases, the neat doctrinal prescription of *Telstra*’s decision-making steps in applying the precautionary principle is thus somewhat limited. In cases involving scientific uncertainty, the principle will continue to give rise to a range of fact-finding possibilities and difficulties in its application.

¹⁶¹ Ibid [200]-[207].

¹⁶² Ibid [140].

¹⁶³ From one that operates in a relationship of inverse proportionality with the level of threat, to one of ‘considerable scientific uncertainty’, to one of ‘reasonable scientific plausibility’: ibid [146]-[148].

¹⁶⁴ Ibid [141].

The reasoning in *Telstra* is remarkable, as a prime example of the novel doctrine being developed by the Court in NSW law – expanding the role of ESD principles to being mandatory relevant considerations that inform and generate decision-making steps in Part 4 *EPA Act* planning consent decisions – as well as being an explicit statement of the ESD agenda pursued by the Court. The novelty of its doctrinal development can be seen in its deliberate formulation as a precedent-setting *planning principle* in the merits review jurisdiction of the Court. While the decision-making steps generated by the precautionary principle were visible in previous LEC decisions, and the decision itself focuses on planning consent decisions under section 79C *EPA Act*, the doctrinal nature of *Telstra*’s reasoning is of a different order. It was intended to resonate as doctrine more broadly in NSW law, marking a turn in the Court’s reasoning with respect to ESD principles. This is demonstrated by its extensive citation in subsequent LEC decisions – across classes of its jurisdiction¹⁶⁵ – and also in a decision of the NSWCA,¹⁶⁶ as the LEC’s supervisory Court.

After *Telstra*, the Court was emboldened to find ESD principles to be required relevant considerations in an even wider range of legal contexts, with decreasing need to justify itself in doing so. Thus *Telstra* set the scene for the next mapping category involving ESD principles in the doctrinal reasoning of the Court. Preston CJ emphasised that ESD principles are applicable whenever a statute adopts the principles,¹⁶⁷ with the implication that the decision’s blueprint for the application of the precautionary principle was relevant for decision-making beyond the *EPA Act*. The following sub-Section accordingly examines how

¹⁶⁵ Eg *Gray* (n75); *Tuite v Wingecarribee Shire Council* [2008] NSWLEC 1315.

¹⁶⁶ *Walker Appeal* (n76).

¹⁶⁷ *Telstra* (n97) [121].

the Court has progressed its ESD doctrine to other statutory decision-making frameworks that refer jurisdiction to the Court.

3 ESD Principles as Legally Relevant Considerations under All Legislation that ‘Adopts’ Principles: the *EPA Act* and Beyond

The third progressive aspect of LEC ESD reasoning is found in this mapping category, in which the Court employs ESD principles as mandatory relevant considerations in relation to decision-making under all statutes that ‘adopt’ ESD principles. This progressive step in the Court’s reasoning broadens the doctrinal relevance of ESD principles in LEC case law, engaging ESD principles in a range of different regulatory contexts to which they must adapt (and find marginal meanings), at the same time as painting an overall doctrinal picture of their fundamental role in LEC case law.

The critical doctrinal step for this proliferation of ESD reasoning in LEC cases, involving a statutory framework outside the *EPA Act*, was set out in the Class 4 judicial review decision in *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources*.¹⁶⁸ In this 2004 case, which preceded both *BGP* and *Telstra*, McClellan J held that ESD principles are to be applied ‘when decisions are being made under... any... Act which adopts the principles’.¹⁶⁹ McClellan J made this finding by explicitly rejecting the view that the precautionary principle, of argued relevance in that case, was a ‘merely a

¹⁶⁸ *Murrumbidgee* (n72).

¹⁶⁹ Ibid [178]. The LEC’s previous (merits appeal) decision in *Keech v Western Lands Commissioner* [2003] NSWLEC 215; (2003) 132 LGERA 23 had applied similar doctrinal reasoning, without setting it out in general terms, requiring the application of the precautionary principle in relation to a merits appeal under s18DA(10)(a) *Western Lands Act 1901*, which included as an object ensuring that the land covered by the Act was used in accordance with ESD principles, as defined by s6(2) *POEA Act* (n32): s2(e).

political aspiration’.¹⁷⁰ This was due to the widespread inclusion of ESD principles, or ESD defined by reference to ESD principles, in the objects clauses of many environmental and planning statutes that refer jurisdiction to the Court and which ‘adopted’ ESD principles through their objects. In McClellan J’s view, this common ESD purpose was of such significance across these statutory frameworks that ESD principles were relevant considerations in decisions made under any such Act, in the common law administrative law sense.

Although there were other statutory objects of these Acts,¹⁷¹ which might otherwise balance the calculation of matters a decision maker was obliged to take into account at common law, the Court was singularly focused on promoting ESD as central to its doctrine. Here is the ESD agenda of the Court at work, moulding administrative law doctrines to create the novel law of the Court. Thus, in *Murrumbidgee*, the Minister was obliged to take into account ESD principles in drawing up a water allocation plan for a particular region under the *Water Management Act 2000*, which had as an object ‘to apply the principles of ecologically sustainable development’.¹⁷² In this case, the Minister had adopted a plan under the Act that significantly reduced water entitlements in order to prevent to the depletion of

¹⁷⁰ *Murrumbidgee* (n72).

¹⁷¹ Eg another statutory object of the *Water Management Act 2000* (NSW) (‘WMA’), at issue in *ibid*, is to ‘recognise and foster the significant social and economic benefits to the State that result from the sustainable and efficient use of water’, including ‘benefits to urban communities, agriculture, fisheries, industry and recreation’ as well as environmental benefits: s3(c). Similarly, the *EPA Act* has other, less environmentally-focused objects, such as promoting the ‘orderly and economic use and development of land’: s5(a)(ii). Jagot J points out the doctrinal problems in favouring ESD as mandatory relevant considerations above other statutory objects: *Drake-Brockman* (n112) [132].

¹⁷² Defined by reference to s6(2) *POEA Act* (n32): s3(a) *WMA*. ESD principles also appear in a different form in the overall object of the Act ‘to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations’: s3. Note there was no merits appeal available in respect of the plan under the *WMA*.

groundwater aquifers, as had been occurring in this area. McClellan J found that the Minister had not failed to take into account mandatory relevant considerations in adopting this plan, since the Minister was required to act according to the precautionary principle ‘which required a regime to be put in place which was likely to sustain the water source’ despite scientific uncertainty concerning the operation of the aquifer in light of water extraction.¹⁷³ In this way, the Court also prescribed a marginal application of the principle on the facts.

Following the ESD reasoning in *Murrumbidgee* was a series of LEC cases concerning the NPWA. These cases involved decisions made under sections 87 and 90 of the Act by which the Director-General of National Parks and Wildlife can permit the disturbance of land for the purpose of discovering an Aboriginal object, or the removal or destruction of such an object.¹⁷⁴ Despite a 2005 Court of Appeal decision suggesting that too much could be read into the obligation under the Act to ‘give effect to’ the objects of the Act,¹⁷⁵ which involved applying ESD principles,¹⁷⁶ later LEC cases went on to find that Director-General consents made under sections 87 and 90 were legally invalid if they failed to take into consideration the principle of intergenerational equity. Thus, in *Anderson v Director-General of the Environment and Conservation*,¹⁷⁷ a judicial review action successfully challenging consent given by the Director-General to destroy Aboriginal objects during the course of a residential

¹⁷³ *Murrumbidgee* (n72) [186].

¹⁷⁴ No merits appeals are available from these decisions.

¹⁷⁵ *Country Energy v Williams; Williams v Director-General National Parks and Wildlife* [2005] NSWCA 318; (2005) 141 LGERA 426 [65].

¹⁷⁶ NPWA, s2A.

¹⁷⁷ *Anderson* (n72).

sub-division development, Pain J held that the principle of intergenerational equity was a mandatory relevant consideration that had not been taken into account.

To determine whether the principle had properly been taken into account, Pain J had to define the principle marginally on the facts. Pain J first defined the principle generally by reference to section 6(2) *POEA Act* – the present generation should ensure that the health, diversity and productivity of the environment be maintained or enhanced for the benefit of future generations – and then more particularly by reference to the facts in this case. The evidence showed that Aboriginal people place considerable cultural importance on ancestral sites where Aboriginal objects are located. Thus, as such sites diminish, so does the opportunity for future generations of Aboriginal people to maintain their cultural heritage, in contravention of the principle of intergenerational equity. In properly considering the principle, the Director-General thus had to take into account ‘the cumulative impact of destruction of Aboriginal objects of significance to Aboriginal traditional owners’ in making any decision under section 90, which he had failed to do.¹⁷⁸

After this case, the Department of Environment and Climate Change commissioned a ‘cumulative impact assessment’ of the Aboriginal objects on this proposed development site, and concluded that there were a large number of other sites of similar Aboriginal significance in the vicinity and that the Aboriginal archeological material on the subject site had already been highly compromised.¹⁷⁹ When the Director-General then granted a second consent to destroy Aboriginal objects under the *NPWA*, a subsequent judicial review challenge was

¹⁷⁸ Ibid [200].

¹⁷⁹ Ibid.

unsuccessful, since the Director-General had relevantly taken into account the principle of intergenerational equity, as defined and applied on these facts.¹⁸⁰

Another set of cases in which the doctrinal reasoning of *Murrumbidgee* is demonstrated, finding that ESD principles are mandatory relevant considerations under an Act that adopts the principles, beyond Part 4 *EPA Act* planning consent decisions, involve a different type of decision-making under the *EPA Act* itself. These are also planning consent decisions, but for major infrastructure projects. Since 2005,¹⁸¹ large-scale and sensitive development in NSW has been approved not through the Part 4 consent procedure, but through a more streamlined Ministerial procedure under Part 3A of the Act. Part 3A sets out a complex statutory procedure for approving such development, demonstrating the highly specific legal context of these cases, and the apparently limited opportunities for considering ESD principles that it provides. This statutory context needs setting out in some detail to demonstrate the doctrinal progressiveness of the Court's reasoning, and also its connection to the very particular legal framework involved.

In contrast to the Part 4 consent procedure, Part 3A does not set out an open-ended list of factors that the Minister is required to take into account in approving 'critical infrastructure projects', (so designated by the Minister, including for environmental reasons).¹⁸² In particular, there is no statutory requirement to consider the 'public interest', which might be interpreted by reference to ESD principles. Part 3A also provides less

¹⁸⁰ *Anderson v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 182 [46].

¹⁸¹ *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*. (NSW)

¹⁸² *EPA Act*, s75C(1).

opportunity for appeal by unsuccessful applicants or objectors since there are only limited avenues of merits appeal to the Court available.¹⁸³ Part 3A is constructed to give the Minister as much discretion as possible, which in turn limits the Court's role in controlling his decision-making.

However, the Minister is required to take into account some matters, in particular a report of the Director-General of the Planning Department,¹⁸⁴ which must include a number of items including: any advice from public authorities in relation to the project, a copy of the proponent's (applicant's) environmental assessment (EA), and 'a statement relating to compliance with the environmental assessment requirements' with respect to the project.¹⁸⁵ These environmental assessment requirements (EARs) are determined by the Director-General and tailored to the particular project, in accordance with any guidelines that have been published by the Minister and taking into account key issues raised by relevant public authorities.¹⁸⁶ The proponent must separately prepare an environmental assessment – this is not explicitly required to meet the EARs but the Director-General may require the proponent to submit a revised assessment if it does not do so and he must 'accept' the EA before making it publicly available.¹⁸⁷ After this EA process, which involves elements of public consultation, the Minister will have a final report to consider in making his approval decision, with little recourse for challenge as to his decision.

¹⁸³ *EPA Act*, ss75K, 75L. Of the Part 3A cases considered in this Section, only *Gerroa Environment Protection Society Inc v Minister for Planning* [2008] NSWLEC 173 is a merits appeal.

¹⁸⁴ *EPA Act*, s75J.

¹⁸⁵ *EPA Act*, s75I.

¹⁸⁶ *EPA Act*, s75F.

¹⁸⁷ *EPA Act*, s75H.

A further complexity in this Part 3A process is that a major infrastructure project may first be designed as a ‘concept plan’ for which Ministerial approval is sought as a preliminary stage in the planning process.¹⁸⁸ The purpose of this procedure is for developers to determine whether the significant investment involved in getting a large-scale project off the ground is worth it. In the case of a concept plan approval, the Minister is also required to consider a Director-General report, prepared in the same way described above in relation to final Part 3A project applications, and he may also find that no further EA of the project is required or, conversely, that a further EA is required at a future stage.¹⁸⁹ Not only are merits appeals also restricted in the case of concept plan approvals, not being available for critical infrastructure projects at all,¹⁹⁰ but any objector appeals in respect of final Part 3A project approvals are disallowed if there has been a concept plan approval.

The result is that challenges to plans for major developments need to be made early, or by way of judicial review. This is seen in the case law. Three major Part 3A ESD cases have been decided in recent years, all judicial review actions: one in respect of the Part 3A EA process prior to a final planning decision concerning a large coal mine, and two concerning concept plans for major building developments (commercial and residential). In all three cases, the Court’s ESD reasoning is remarkable, both for the distinctive and constrained legal context into which they must fit, and in the novel environmental law doctrine that they generate.

¹⁸⁸ *EPA Act*, Part 3A, Div 2.

¹⁸⁹ *EPA Act*, ss75N-75P.

¹⁹⁰ *EPA Act*, s75Q.

First was *Gray v Minister for Planning*, in which Pain J used ESD principles to conclude that the Part 3A process in relation to a planning application for a coal mine project had been flawed.¹⁹¹ At the time of this case, the Minister had not yet made a decision on whether to approve the mine. Rather, the Director-General had published EARs, which included ‘air quality – including a detailed greenhouse gas assessment’, and the applicant had provided an EA which included a limited assessment of greenhouse gases (GHGs). The assessment was limited in that it considered energy consumption and GHG emissions from the mine project itself, but not potential emissions from the burning of coal sold on to third parties (latter known as ‘Scope 3 emissions’).¹⁹² In short, Pain J found that the Part 3A process had not been properly followed because these Scope 3 omissions were omitted from the applicant’s EA, in breach of the principle of intergenerational equity and the precautionary principle. The doctrinal reasoning involved in reaching this conclusion was complicated. Initially, Pain J struggled to find any requirements with respect to the content of an EA at all in Part 3A, particularly since there was no explicit requirement that an EA should comply with the Director-General’s EARs, leaving maximum discretion in the process for the Director-General as well as the Minister. This also meant that there was no obviously justiciable decision to challenge in a judicial review action. However, Pain J construed the Director-General’s duty to ‘accept’ the EA before publishing it as requiring him to find that it complied with the relevant EARs.¹⁹³ This allowed Pain J to explore

¹⁹¹ *Gray* (n75)

¹⁹² ‘Scope 3 emissions’ is the terminology used in an internationally accepted methodology for assessing GHGs adopted by the applicant in its EA.

¹⁹³ *Gray* (n75) [105].

whether the Director-General had made that finding lawfully, according to administrative law doctrine.

Pain J then examined whether the Director-General had failed to consider mandatory relevant considerations in appraising the EA's compliance with the EARs. Her Honour looked to the 'substantial judicial pronouncement' of *Telstra*, as well as the (by now) considerable LEC case law confirming the importance of ESD principles for decision-makers under Acts that adopt the principles, and concluded that 'all decisions under the *EPA Act* require that ESD principles be considered in any event'.¹⁹⁴ Thus the broad discretion of the Director-General was to be exercised in accordance with ESD principles.¹⁹⁵

Having made this finding that ESD principles are mandatory relevant considerations to be taken into account, Pain J then determined whether they were in fact relevant on the facts of this case, and, if so, whether they were taken into account. This aspect of her reasoning required her to engage with questions of fact, overlapping with the 'merits' of the case, thereby giving marginal meanings to the ESD principles involved: the principle of intergenerational equity and precautionary principle.

In the context of Part 3A's EA requirement, the principle of intergenerational equity was applicable in this case because a critical part of implementing the principle was assessing the 'cumulative impacts' on the environment, which included the major component of GHG that results from the use of coal caused by Scope 3 emissions. Thus there had been a failure of the 'legal requirement' to consider the principle of intergenerational equity by the

¹⁹⁴ Ibid [114].

¹⁹⁵ Ibid [115].

Director-General's acceptance of the applicant's EA with no reference to Scope 3 emissions. With respect to the precautionary principle, Pain J engaged in more awkward reasoning to find that it was applicable, since the Director-General's decision was not concerned with the final approval of the project to which the application of the precautionary principle would be relevant, if the two thresholds in *Telstra* were met. Suspecting that it would be applicable at that stage, Pain J found that the precautionary principle also had relevance in relation to the EA and its GHG assessment. This was because 'inherent' in the precautionary principle was 'an assessment of the risk-weighted consequences for various options' to allow for 'careful evaluation to avoid serious or irreversible damage', in accordance with the section 6(2) *POEA Act* definition of the principle.¹⁹⁶ Since the role of EIA is crucial as a 'precautionary enabling device', providing sufficient information concerning scientific uncertainty in relation to the serious, irreversible threat of climate change, and to assess risk-weighted consequences of options in relation to the coal mine project, the applicant's EA had failed to satisfy the precautionary principle by leaving out Scope 3 emissions. This was a 'failure to comply with a legal requirement',¹⁹⁷ by leaving out the consideration of the precautionary principle, as defined on the facts, which was a mandatory consideration.

After this bold doctrinal implication of ESD principles as mandatory relevant considerations in decisions under Part 3A, Jagot J delivered a more restrained judgment in *Drake-Brockman*.¹⁹⁸ This case was challenged Ministerial approval of a concept plan for the commercial and residential development of a large former industrial site in inner-city

¹⁹⁶ Ibid [131]. This did not in fact invalidate the EA process undertaken under Part 3A in this case, as the applicant subsequently submitted a report assessing the impact of Scope 3 emissions from the project.

¹⁹⁷ Ibid (n75) [135].

¹⁹⁸ *Drake-Brockman* (n112).

Sydney. The project proponent's EA had considered ESD concerns by adopting industry and government standards for energy and water use, which took into account consequential impacts such as GHG emissions. The Director-General's report had subsequently considered the proposal, including the EA, and found the proposal 'consistent with ESD principles'.¹⁹⁹ The applicant, in Class 4 judicial review proceedings, challenged the Minister's consequent approval of the plan, arguing that the Minister had insufficient evidence before him to give 'proper, genuine and realistic consideration' to ESD principles and had merely paid lip service to them, considering that GHG emissions from the project would be substantial. In particular, the Minister had not considered a quantitative assessment of GHG emissions with respect to the site. Jagot J rejected this argument, on the basis that it invited an impermissible intrusion into the merits of the decision. Her Honour could do this by rejecting any suggestion that ESD principles have any kind of general meaning:²⁰⁰

The definition of "ecologically sustainable development"... nominates the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (each as explained in the statutory definition) as "principles and programs" [that] are not confined to any specific subject matter such as greenhouse gases or climate change. They also do not mandate any particular method of analysis of a potentially relevant subject matter or outcome in any case.

Jagot J thus distinguished *Gray* finding that it did not represent a 'general proposition' that Part 3A required any particular form of GHG assessment for all projects to which it applies; such an understanding would be 'inconsistent with the statutory provisions and established

¹⁹⁹ Ibid [116].

²⁰⁰ Ibid [132].

principles of judicial review’.²⁰¹ However, *Drake-Brockman* technically maintained the doctrine that ESD principles were legally required considerations under the Part 3A procedure, whilst emphasising that the application of generally-stated ESD principles is marginal and highly fact-dependent. Jagot J’s retreat to conventional administrative law reasoning demonstrates that LEC reasoning does not operate in an institutional vacuum – its reasoning is influenced and constrained by legal doctrine in NSW more broadly. It also demonstrates that the Court’s progressive reasoning in implying ESD principles as mandatory relevant considerations under Part 3A is quite radical, so that this evolution of LEC doctrine requires both careful adjustment of administrative law principles at common law and a settling of judicial attitudes within the LEC itself.

Such a settlement of judicial thinking came in the third major Part 3A case: *Walker v Minister for Planning*.²⁰² In *Walker*, Biscoe J conducted a judicial review of, and quashed, a decision of the Minister for Planning to approve a ‘concept plan’ for a major infrastructure project (a large residential subdivision and retirement development near the coastline) under Part 3A. Biscoe J found that the Minister had failed to take into account a relevant consideration he was bound to take into account: ‘ESD principles’. Rather than considering particular ESD principles in isolation, Biscoe J engaged in extensive exploration of ESD as a concept and its principles (relying particularly on the importance of the international ESD agenda),²⁰³ to conclude that, on the facts of this case, ESD principles required consideration of the potential impact on the proposed development of increased flood risk due to climate

²⁰¹ Ibid [131].

²⁰² *Walker* (n75).

²⁰³ Ibid [47]-[155].

change. His Honour stressed the ‘deadly serious issue of climate change’ and ‘gravity of the well-known potential consequences of climate change’ to find that climate change flooding risk was a relevant ESD consideration, which, on the facts, the Minister had not considered.²⁰⁴ This is another example of the Court stretching the doctrinal roles of ESD principles to pursue an environmentalist agenda. Notably, however, Biscoe J dismissed a second argument concerning a particular ESD principle – the conservation of biological diversity – that the Minister allegedly failed to consider. He found that the purported relevance of this principle, in connection with the proposed development’s impact on endangered ecological communities, stretched the suggested marginal meaning of this required ESD-based consideration too far.²⁰⁵

To justify the progressive reasoning in this case, Biscoe J focused on a reference to the ‘public interest’, which the Minister was required to take into account in approving a concept plan, according to secondary legislation,²⁰⁶ as well as the reasoning in *Gray*.²⁰⁷ The ‘public interest’ must be interpreted in light of the ESD object of the Act,²⁰⁸ echoing the reasoning in *Telstra* and other section 79C cases. Further, Biscoe J draws on administrative law doctrine at common law to justify his conclusion, adapting it to the task and agenda of the Court. Thus in accordance with the principles of administrative law, an administrative decision ‘is to be made on the basis of the most current material available to the decision-

²⁰⁴ Ibid [164]-[166].

²⁰⁵ Ibid [169]. In any case, Biscoe J was satisfied that the Minister had sufficiently considered ESD with respect to the proposal’s impact on endangered ecological communities: [173].

²⁰⁶ *Environmental Planning and Assessment Regulation 2000* (NSW), cl 8B.

²⁰⁷ *Walker* (n75).

²⁰⁸ Ibid [163].

maker which has a direct bearing on the justice of the decision’.²⁰⁹ Biscoe J here cites the seminal reasoning of Mason J in *Peko-Wallsend*,²¹⁰ but adapts it to the circumstances of environmental decision-making in this case. While Mason J was concerned in *Peko-Wallsend* with administrative decision-makers relying on current material so as to allow ‘justice’ as between individuals (in that case in respect of a land grant), Biscoe interprets this as a concept of justice that is not personal to the individuals involved in the relevant dispute but is a wider social idea of justice. This reasoning allows Biscoe J to take judicial notice of a pressing social issue to inform his inquiry as to the relevance of ESD principles in this case and their particular role as mandatory considerations. Again, common law doctrine is shaped by, and adapts to, the legal culture of the Court, including its ESD agenda.

Following these three judicial review actions came a merits appeal under Part 3A: *Gerroa Environment Protection Society Inc v Minister for Planning*.²¹¹ This case was an appeal from a Ministerial decision to extend a sand quarry within the area of an endangered ecological community (‘EEC’). Preston CJ approved the application to extend the quarry on the merits, and his reasoning was notable for two reasons. First, he employed ESD principles (here the integration principle and principle of conservation of biological diversity) to justify his decision on this Part 3A development application, following the doctrinal path established in the Part 3A cases above. Second, he defined these principles, and weighed them against each other, in such a way as to allow the environmentally sensitive development to proceed. Thus he defined the integration principle as requiring the ‘effective

²⁰⁹ Ibid [164].

²¹⁰ *Peko-Wallsend* (n74).

²¹¹ *Gerroa* (n182).

integration of economic, social and environmental considerations in the decision-making process’ so that a consideration of the ‘value’ of the rich sand mining resource in this case was important.²¹² Equally, conservation of biological diversity refers to ‘genetic, species and ecosystem diversity’,²¹³ and the conservation of vegetation that promotes such diversity (including the EEC in this case) needed to be a ‘fundamental consideration’ in determining a development application that involves removing such vegetation. In the result, this fundamental consideration could be accommodated in conditions attaching to the planning consent,²¹⁴ and the definition and interaction of these two ESD principles in this case demonstrates another fact-specific example of their application.

In this mapping category, ESD principles have been employed in the LEC’s evolving doctrine to justify decisions by operating as mandatory relevant considerations in relation to decision-making under a variety of environmental and planning statutes that ‘adopt’ ESD principles through their objects clauses. Through this reasoning, the Court broadens the doctrinal reach of ESD principles in its case law, giving rise to a body of increasingly connected and novel environmental law doctrine centred on ESD principles. This developing law is connected due to the widespread incorporation of ESD principles as objects in legislation that refers jurisdiction to the Court. It is novel in that it arises in both judicial and merits review decisions, exposing the false strict dichotomy of these actions at

²¹² Ibid [7].

²¹³ Ibid [65].

²¹⁴ Ibid [135].

common law,²¹⁵ and otherwise adapting administrative law doctrines at common law to the jurisdiction and agenda of the Court. This last aspect – the Court’s ESD agenda – confirms the centrality of ESD principles in the Court’s evolving doctrine. With this motivation, the Court has privileged the ESD object above others as a mandatory relevant consideration, and defined ESD principles on particular facts to include pressing environmental issues, as in *Walker*. In the following sub-Section, this trend in the progressive doctrinal reasoning of the Court continues, with the relevance and importance of ESD principles as mandatory matters for consideration being further entrenched by and in the Court’s reasoning.

4 ESD Principles as Legally Relevant Considerations beyond Legislative Frameworks Altogether

The next mapping category includes cases in which the LEC employs ESD principles doctrinally, as mandatory relevant considerations for no reason other than the force of the Court’s own reasoning. Rather than linking such reasoning to an applicable statutory framework, ESD principles have an independent doctrinal role in these LEC decisions, with no more precise legal reason for their relevance. ESD principles are thus maxims which are drawn on to justify LEC decisions in various ways, where applicable on the facts, giving them an inherently doctrinal role in LEC reasoning. This represents another way in which the LEC engages in progressive doctrinal reasoning involving ESD principles, and highlights that ESD doctrine has become ingrained in the Court’s environmental law.

²¹⁵ Since, in these cases, the same legal issue (of determining mandatory relevant considerations) arises in both cases, and judicial review actions require engagement with the merits so as to determine whether relevant ESD principles have properly been taken into account.

Seeds of this implicit doctrinal reasoning involving ESD principles can be seen in early merits appeals involving the precautionary principle. In cases such as *Greenpeace* and *Lend Lease*,²¹⁶ the Court did not engage in detailed reasoning interpreting section 79C to find that the precautionary principle was a required relevant consideration. Rather, the Court used no reasoning technique other than relying on its own case law – in particular, *Leatch* – to accept counsel’s arguments that the principle should apply in deciding the case before it.²¹⁷ This classic common law technique, deriving legal doctrine from previous case law, confirms how the Court develops its own doctrine, including in its merits review jurisdiction.

A recent case that highlights the entrenched ESD doctrinal reasoning in LEC case law is *Taralga Landscape Guardians v Minister for Planning*.²¹⁸ This was a merits appeal from a Minister’s decision to approve a wind farm, brought by a group of community objectors. Preston CJ found that the wind farm should be approved, particularly on the basis of the principle of intergenerational equity. He explained the implicit doctrinal relevance of this principle thus: ‘[the] principles of sustainable development are central to any decision-making process concerning the development of new energy resources’.²¹⁹ No longer was there any reference to the particular statutory framework involved, as required to determine mandatory relevant considerations in administrative law doctrine, but it was the issue before

²¹⁶ *Greenpeace* (n126); *Lend Lease Development v Manly Council* [1998] NSWLEC 136. See also eg *Our Firm Facility v Wyong Shire Council* [2001] NSWLEC 243.

²¹⁷ Despite the sceptical judicial attitudes in both these cases as to how the principle should apply on the facts.

²¹⁸ *Taralga Landscape Guardians Inc v Minister for Planning* [2007] NSWLEC 59; (2007) 161 LGERA 1.

²¹⁹ *Ibid* (emphasis added).

the Court that justified its reliance on ESD principles.²²⁰ The ESD agenda of the Court was very much at work, with the Court keen to decide on the proper development of energy policy. Preston CJ discussed various policy developments and papers on climate change and wind energy to conclude that the ‘broader public good of increasing the supply of renewable energy’ justified granting planning approval for the scheme under consideration.²²¹

With reference to the principle of intergenerational equity, Preston CJ defined it to use it to justify the planning consent decision. He found that intergenerational equity, in this context of energy production, involved a meeting two requirements. First, the ‘mining of and their subsequent use in the production of energy of finite, fossil fuel resources need to be sustainable’, both in terms of the exploitation of the resource and the maintenance of the ecological environment.²²² Second, as far as practicable, intergenerational equity requires the substitution of energy sources that result in fewer GHG emissions for energy sources that result in more GHG emissions, ‘thereby reducing the cumulative and long-term effects caused by anthropogenic climate change’.²²³ By these two requirements, the ‘present generation reduces the adverse consequences to future generations’.²²⁴ This highly prescriptive statement of energy policy is the ‘definition’ of the principle of intergenerational equity in this case, which is marginal in that is specific to the facts and decision at issue, and

²²⁰ However, it is still an appeal under the *EPA Act*, in relation to which ESD principles have been confirmed as doctrinally relevant for a number of reasons, as seen in other mapping categories: above Sections C(1), (2) and (3).

²²¹ *Taralga* (n217) [3]; [67]-[81].

²²² *Ibid* [74].

²²³ *Ibid*.

²²⁴ *Ibid*.

which is applied to decide the case, having been so elaborated as a relevant matter for consideration.

This decision demonstrates the implicit doctrinal relevance, and importance, of ESD principles in LEC reasoning. As the ESD case law of the Court has built over time, so has the confidence of the Court in applying the principles to justify its reasoning and decisions. This confidence is confirmed in the next sub-Section, which sets out the final mapping category.

5 ESD Principles as Legally Relevant Considerations in All Aspects of LEC Jurisdiction

The final mapping category includes cases in which ESD principles are employed as legally relevant considerations in a looser doctrinal sense – beyond cases of administrative law (merits or judicial review) – to justify decisions in all aspects of LEC jurisdiction. This is particularly evident in the other major aspect of LEC jurisdiction: its jurisdiction to hear trials in respect of criminal offences and criminal appeals.²²⁵ This reasoning is progressive, not only in expanding ESD doctrine in LEC case law, but in its use of ESD principles to inform common law sentencing principles.

An early sentencing case in which the Court used ESD principles was *EPA v Transgrid*.²²⁶ The defendant was being sentenced for an offence under section 120

²²⁵ Above n42. Note ESD principles have also been relevant in determining costs decisions, although in relation a prior merits appeal: *Miltonbrook v Kiama Municipal Council* [1998] NSWLEC 281.

²²⁶ *Environment Protection Authority v TransGrid* [2003] NSWLEC 18.

Protection of the Environment Operations Act for causing water pollution.²²⁷ Lloyd J found that ESD principles, included in the Act's objects,²²⁸ along with the defendant's status as a state-owned corporation, imposed on the defendant a 'special obligation' to comply with the environmental law at issue, such that its conduct amounted to an 'aggravating factor' for sentencing purposes.²²⁹ ESD principles thus accentuated the gravity of the offence and weighed in favour of a tougher sentence.

Similar but more detailed reasoning, involving ESD principles, is found in two later cases arising out of the same set of facts: *Bentley v Gordon*,²³⁰ and *Bentley v BGP Properties*.²³¹ These cases involved an offence under section 118A(2) *NPWA* related to clearing an endangered species of vegetation on a site planned for development by the second defendant, *BGP Properties*. The first defendant, Mr Gordon, was the project manager of the site (for *BGP*), who carried out the clearing operation. In sentencing Mr Gordon, Preston CJ used the principle of conservation of biological diversity to inform a basic common law sentencing principle – determining the gravity of the crime in light of its 'objective circumstances'.²³² Of those circumstances, it was the 'seriousness of the harm' that was relevantly informed by the ESD principle in this case, resulting in a sentence at the higher end of the scale. This was because the relevant vegetation unlawfully cleared in this case was a threatened species and also a sub-population that was key to the genetic diversity

²²⁷ *Protection of the Environment Operations Act 1997* (NSW).

²²⁸ *Ibid*, s3(a).

²²⁹ *Transgrid* [117]-[118].

²³⁰ *Bentley v Gordon* [2005] NSWLEC 695.

²³¹ *Bentley v BGP Properties* [2006] NSWLEC 34; (2006) 145 LGERA 234.

²³² *Hoare v R* (1989) 167 CLR 348 [7].

of the species – a ‘critical component’ for the conservation of biological diversity.²³³ Thus the criminal offence in this case offended this ESD principle, so defined and applied on the facts, thereby magnifying the seriousness of the harm caused and justifying a harsher sentence.

In the subsequent criminal case *Bentley v BGP Properties*, a year later, the progressive doctrinal and ESD agenda of the Court is starkly obvious. In sentencing BGP Properties, Preston CJ engaged in much more extensive reasoning and doctrinal employment of ESD principles – the precautionary principle, principle of intergenerational equity, conservation of biological diversity, polluter pays principle (and internalisation of environmental costs), and integration principle. All these principles were variously used to inform the ‘objective circumstances’ of the same offence as in the previous case, including the objective seriousness of the offence, as well as the seriousness of the harm caused.

In terms of the seriousness of the offence, Preston CJ found that the statutory framework of the offence, including its ESD objects,²³⁴ made this a serious offence,²³⁵ as in *Transgrid*.²³⁶ His Honour also concluded that the circumstances of the offence made it serious since clearing the threatened species of vegetation thwarted the attainment of ESD. Preston CJ went through each ESD principle and showed how they were undermined on the

²³³ *Bentley* (n229) [73]-[75].

²³⁴ The objects of both the *NPWA* and the *TSC Act* were relevant to this offence and both included promotion of ESD, defined by reference to ESD principles.

²³⁵ *Bentley v BGP* (n230) [52]-[63].

²³⁶ See also *Minister for Planning v Moolarben Coal Mines* [2010] NSWLEC 147 [73].

facts by the defendant's actions.²³⁷ As for the seriousness of the harm caused, Preston CJ adopted similar reasoning to that in *Bentley v Gordon*.²³⁸

In the result, the Court's use of the 'pillars' of ESD justified a harsh sentence in this case.²³⁹ Preston CJ put this reasoning and outcome into a broader context of sentencing for environmental crime. His Honour was concerned that environmental crime should generally be taken more seriously and punished severely, particularly in light of the recent history of environmentalism amongst the 'informed and responsible public' at state, national and international levels.²⁴⁰ Further, Preston CJ explicitly drew on ESD reasoning from other Classes of the Court's jurisdiction, displaying an agenda to promote not just environmentalism, but also a unified ESD doctrine in pursuit of that aim in the reasoning of the Court.²⁴¹ To pursue this ESD agenda, ESD and its principles were thus drawn on as a 'touchstone, a central element in decision-making relating to planning for and development of the environment and the natural resources that are the bounty of this environment'.²⁴² It is within this grand and ambitious doctrinal narrative that ESD principles now sit in the reasoning of the Court. This progressive judicial reasoning in the final mapping category exposes the central, and centralising, importance of ESD principles in the reasoning of the Court across all aspects of its jurisdiction, demonstrating that ESD principles are at the core of the LEC's developing environmental law doctrine.

²³⁷ *Bentley v BGP* (n230) [171].

²³⁸ See also *Plath v Rawson* [2009] NSWLEC 178 [56].

²³⁹ *Bentley v BGP* (n230) [71], [171].

²⁴⁰ *Ibid* [145].

²⁴¹ Eg *ibid*: Preston J drew on *Murrumbidgee* (n72) (judicial review) to find that ESD principles were central to informing common law sentencing principles.

²⁴² *Bentley v BGP* (n230) [57].

D CONCLUSION

This Chapter has shown that the LEC is a unique legal institution with an evolving legal culture that finds particular expression in its treatment of ESD principles. The Court embraces the principles as concepts that allow the Court to move its doctrine and its identity on, in a way that is intended to promote environmental protection and goals of sustainable development. While the Court is consciously concerned to be part of an institutional, and international, solution for dealing with pressing environment problems, the map of LEC cases in this Chapter shows that environmental principles take on doctrinal roles in NSW law that are highly dependent on the legal culture in which they are employed.

This legal culture is particularly shaped by the unique institutional identity of the Court. This includes the rationalising and pragmatic reasons for its distinctive creation as a specialist environmental court; its uniquely fragmented but interlinked statutory exclusive jurisdiction; its progressive ESD agenda; and the ambiguous administrative law doctrines that it applies and develops,²⁴³ and uses it as a springboard for the implicit and pervasive doctrinal use of ESD principles across all aspects of its jurisdiction. Thus, ESD principles have become central to the Court's reasoning – they are a touchstone for the Court's evolving doctrine, thereby in turn shaping the legal culture of the Court.

In developing such central doctrinal status for ESD principles in LEC case law, the Court has engaged them in its reasoning by a variety of progressive techniques. These are not individual reasoning techniques, such as informing legal tests or having interpretive

²⁴³ And challenges: Cripps, 'Administrative Law' (n84) 39-40.

roles, which might act as mapping categories (as in EU law), but they are different and increasingly progressive ways in which such techniques are employed by the Court to develop its ESD doctrine, demonstrating the innovative reasoning of the Court and its increasing confidence in pursuing an ESD agenda. These progressive steps in the Court's ESD reasoning constitute the five mapping categories in this Chapter, which range from using ESD principles to justify planning consent decisions under Part 4 of the *EPA Act*, to justifying decisions in all aspects of its jurisdiction, including in sentencing for criminal offences.

In all categories, ESD principles are found to be mandatory relevant considerations that justify the Court's reasoning (and guide how administrative decision-making supervised and directed by the Court should be justified). And, while ESD principles are not mandatory relevant considerations in the administrative law sense in the Court's sentencing decisions, these criminal cases demonstrate how entrenched this doctrine has become in the Court's reasoning – it can motivate and provide a foundation for all of the Court's reasoning. Thus, the open and ambiguous doctrine of mandatory relevant considerations in administrative law terms instigated the lines of progressive reasoning leading to the Court's innovation to consider, and require consideration of, ESD principles in justifying all its decisions.

What then of the doctrinal roles for ESD principles in LEC reasoning for environmental law scholarship more broadly? It is tempting to conclude that at least three of the legal scholarly hopes for environmental principles set out in Chapter 2 have come to pass in LEC case law: that environmental principles might bring coherence to environmental law, that they might act as the basis of a new form of law, and that they might assist in solving environmental problems. In the first instance, it can be concluded that ESD principles do

unify environmental law in NSW. In fact, this has been a deliberate aim of the Court throughout the progressive doctrinal reasoning outlined in Section C. Thus Preston CJ, in the recent case of *Hub Action Group*, implicitly used ESD principles to justify his reasoning,²⁴⁴ in an explicit effort to ‘institutionalise’ ESD principles and translate their ‘grand strategy’ into action.²⁴⁵ This is not to say that environmental principles provide general foundations for environmental law universally, despite the Court’s appeal to environmental principles in other jurisdictions to give authority to its innovative reasoning in key cases. Rather, ESD principles unify environmental law in the particular jurisdictional environment of the Court, and in the context of its distinctive judicial architecture and agenda.

It is also not to say that ESD principles can give environmental law legitimacy as a legal discipline by acting as legal principles in the common law Dworkinian sense, conventionally and properly guiding judicial decision-making. On the contrary, ESD principles, as employed by the Court might be seen as constituting ‘policy’ in some instances and thus impermissibly used as doctrine by the Court on constitutional grounds.²⁴⁶ This is particularly the case with respect to planning principles,²⁴⁷ and in merits appeals in which the Court is robust in prescribing how collective environmental interests ought to be pursued.²⁴⁸

The fate of other scholarly hopes for environmental principles is even more dubious in the case of ESD principles in LEC reasoning. For one thing, this is because, while the

²⁴⁴ Albeit in obiter dicta (arguably there is such a thing in doctrine-containing and precedent-generating merits appeals).

²⁴⁵ *Hub* (n1) [2].

²⁴⁶ Chapter 2, n66 and accompanying text.

²⁴⁷ Williams, ‘Land and Environment Court’s Planning Principles’ (n99).

²⁴⁸ Eg *Taralga* (n217); *Hub* (n1).

LEC's ESD doctrine is innovative and progressive, it falls short of generating a new form of law altogether (which, for example, rewrites the basic rules of property and land use). This is because the Court still operates within statutory frameworks and some doctrinal limitations. The Court's treatment of ESD principles thus reflects jurisdictional constraints and common law connections as well as the novel opportunities of its unique legal setting.

In terms of how ESD principles might solve environmental problems, the resulting picture from this Chapter's mapping exercise is again, at best, tenuous. Despite Preston CJ's ambition that the Court's case law might do just this – address pressing environmental problems²⁴⁹ – particularly in light of its jurisdiction to decide cases on the merits and its progressive environmentalist agenda, two problems remain. First, the predictability of any solutions to environmental problems provided by environmental principles is undermined by the fact-specific application of ESD principles, once found legally relevant. Marginal application and definition of environmental principles were consistently observed throughout the mapping exercise of this Chapter. Second, it is very difficult (and certainly legally impossible) to determine whether a particular application of an ESD principle constitutes a 'solution' to an environmental problem. Not only is this determination dependent on scientific rather than legal appraisal, but, as seen in some LEC cases, ESD principles might point in different directions as to the environmentally protective, or sustainability-promoting, outcome required on the facts.²⁵⁰

²⁴⁹ Above, text accompanying n66.

²⁵⁰ Eg *Greenpeace* (n126); *Gerroa* (n182); *Taralga* (n217); *Hub* (n1). Note that Preston CJ has also been explicit that, where possible, ESD principles should work together, in a complementary fashion to justify a particular decision: *Telstra* (n97) [182].

In sum, the LEC is an excellent example of a legal context in which environmental principles might have significant and transformative legal roles. In the LEC case law mapped in this Chapter, ESD principles are central to a novel body of environmental law and doctrine developed by the Court through progressive and innovative reasoning. However, the legal roles for ESD principles in this body of law remain intertwined with, and depended on, the distinctive legal culture of the Court and the law it applies. This legal setting is unique and, while it may be inspirational to legal scholars, lawyers and systems elsewhere,²⁵¹ it has no legal equivalent internationally; accordingly, nor do its environmental principles.

²⁵¹ H Woolf, 'Judicial Review: A Possible Programme for Reform' [1992] PL 221, 228-229; R Carnwath, 'Environmental Enforcement: the Need for a Specialist Court' [1992] JPEL 799, 808; Cowdroy, 'Land and Environment Court of New South Wales' (n36); Grant Report (n63).

CHAPTER 6

CONCLUSIONS

The thesis has mapped the doctrinal treatment of environmental principles in the evolving case law of the European courts and the NSW LEC to demonstrate that the increasing legal relevance of these principles can only be understood in terms of the distinct legal cultures in which they feature. Environmental principles are a significant and relatively new story for environmental law, a scholarly discipline beset by methodological challenges and novel concepts. Environmental principles do not follow or fit an established tradition of legal doctrine or theory – as tempting as it might be for legal scholars, advocates or judges to associate them with a particular legal tradition, to legitimise or ease analysis or reasoning. Environmental principles are not straightforward or established legal concepts that have pre-determined meanings, roles and effects. Rather, environmental principles are generally formulated phrases, representing policy ideas, which also have increasingly prolific but highly context-specific legal roles in EU and LEC case law. These bodies of cases present a rich source of legal material for examining – in this thesis by mapping doctrinal developments – what legal roles environmental principles can and do take on, understood in terms of these particular legal cultures. Section A below sets out the results of this examination in EU and NSW law. Mapping these roles and comparing them across legal cultures also has broader consequences for environmental law

scholarship, a sizeable body of which invests great hope in environmental principles as solutions to environmental problems *and* legal problems in environmental law scholarship. These broader conclusions are set out in Section B.

A DOCTRINAL ROLES FOR ENVIRONMENTAL PRINCIPLES IN DIFFERENT LEGAL CULTURES

This thesis identified when and how environmental principles are used doctrinally by the EU courts and the LEC – when they are used to justify legal reasoning or a legal outcome. Absent any pre-existing methodology for analysing environmental principles, this doctrinal approach included *all* legal developments involving environmental principles, no matter how novel or particular to each legal culture. This allowed the mapping project to be comparative in a way that took account of, and indeed focused on, the critical idiosyncrasies of the legal cultures involved. These cultural elements shaped, and in the case of the LEC were shaped by, the legal roles of environmental principles.

In both legal contexts, the cases were organised in categories according to the judicial techniques used with respect to the principles, so that the particular doctrinal roles played by environmental principles could be isolated, and a doctrinal map of environmental principles in each body of case law drawn. The mapping categories differed between EU and LEC cases, demonstrating the different legal roles played by environmental principles in these two legal cultures.

Chapter 4's map showed that EU environmental principles are used (or not used) doctrinally in three ways. In policy cases, environmental principles play no

doctrinal role, often despite legal argument to the contrary. In interpretive cases, environmental principles inform the interpretation of ambiguous legal provisions. In informing legal test cases, environment principles inform legal tests reviewing the boundaries and exercise of EU environmental competence. The contours and contents of these treatment categories are shaped by distinctive features of EU legal culture, including the jurisdiction of the EU courts and legal questions they address, their evolving and open doctrine (particularly of ‘EU administrative law’), and their style of reasoning.

Further, the *constitutional* role of the EU courts, and the proper limits of their review of decision-making by EU and Member State institutions, determines the doctrinal roles of environmental principles in EU case law. It is only when EU and Member State (legislative and administrative) institutions first exercise ‘EU environmental competence’,¹ on the basis of environmental principles, that EU courts employ those principles doctrinally in their reasoning, either to interpret or test the legality of the policy discretion so exercised. This constitutional limit built into EU doctrine involving environmental principles both constrains legal roles for environmental principles (as seen in policy cases), and provides an opportunity for the CJEU to be progressive in its review of institutional action. In the latter sense, the Court has developed detailed and intensive tests of review in relation to action taken on

¹ As broadly understood in this thesis.

the basis of the precautionary principle (particularly by generating a test of adequate scientific evidence).²

The Court has also, in some cases, taken an expansive view in assuming when action has, or should have, been taken on the basis of environmental principles. This opens up the range of institutional decision-making within the scope of EU environmental competence that might be subject to legal scrutiny, as informed by environmental principles. This expansion of EU environmental competence has been catalysed particularly by the integration principle. This principle has a distinctive role in EU case law, expanding and defining the size and shape of the map of cases in which environmental principles have doctrinal roles, demonstrating how environmental protection considerations infuse other EU policy domains by the *legal* integration of environmental principles through an expanding scope of EU environmental competence.

In LEC case law, by contrast, environmental principles have fundamentally different legal roles. The group of relevant ‘ESD principles’ is differently constituted, having been formulated through a deliberative and well-documented Australian policy-making process, influenced by both national political and legal issues and the simultaneously evolving international sustainable development agenda. The Court employs these ESD principles as *legally required relevant considerations* in relation to the full range of questions before it, manipulating its ambiguous administrative law

² Although constitutional limits still qualify and complicate this doctrinal role of the precautionary principle, since the courts must still allow (often difficult) policy decisions to be made.

doctrine and infusing its case law with ESD principles in a range of increasingly progressive ways. ESD principles are now so doctrinally entrenched in LEC reasoning that they have an inherent legal relevance in many LEC cases. The doctrinal map of ESD principles in LEC case law, set out in Chapter 5, is categorised according to the various progressive ways in which the Court has employed ESD principles as legally relevant considerations to justify its reasoning. The map looks very different from that of EU law in Chapter 4, reflecting the different legal culture of the LEC, and particularly its jurisdictional reach into quasi-administrative decision-making. Rather than simply waiting for judicial review challenges based on ESD principles to be brought, the Court, in its merits review role, can establish legal reasons justifying the application of ESD principles in administrative decision-making as a matter of course.³ This is done, not as a matter of judicial oversight but by way of judicially transparent example.

Another critical element of the Court's legal culture is its progressive environmentalist or 'ESD' agenda which, amongst other things, unites the disparate classes of the Court's statutory jurisdiction, and influences its developing body of distinctive NSW environmental law. As a result, the ESD doctrine of the Court is expansive and intentionally progressive, to the point where ESD principles are central to the environmental law applied by the Court, in turn shaping the nature of the Court as a judicial institution. Unlike the EU courts, where implicit and self-imposed limits

³ This merits review jurisdiction has in turn encouraged the Court to employ ESD principles innovatively and progressively in judicial review actions, blurring doctrinal lines across its jurisdictional classes.

on their constitutional role determine the doctrinal roles of environmental principles, in NSW law, there are no such limitations on the legal roles of ESD principles. Rather, it is ESD principles that contribute to defining the institutional role of the LEC, informing and justifying decisions across all elements of its jurisdiction – from judicial review to merits review to sentencing decisions – with a view to pursuing an agenda of sustainable development and environmental protection.

In short, the maps in Chapters 4 and 5 illustrate how environmental principles take on varying and contingent legal roles in different legal systems and courts. These roles are expressions of the legal cultures of which the principles form part.

B ENVIRONMENTAL PRINCIPLES IN ENVIRONMENTAL LAW SCHOLARSHIP

Beyond determining the legal roles played by environmental principles in the two legal systems examined, this thesis aimed to draw broader conclusions for environmental law scholarship from its mapping of environmental principles. This is significant because environmental law scholars place a lot of importance on environmental principles, and what these principles might do *as legal concepts* to solve both environmental problems and legal problems in environmental law. These high hopes were set out in Chapter 2. As a result of the mapping in Chapters 4 and 5, it can be concluded that scholarly hopes concerning environmental principles in environmental law are often misplaced, or they need to be more precisely crafted within a methodological framework that takes into account legal culture.

In particular, there are four methodological weaknesses that affect scholarly hopes with respect to environmental principles. These were prefaced in Chapter 2(C)

and then demonstrated by comparatively mapping the doctrinal roles of environmental principles in EU and LEC case law. First, scholarly claims that environmental principles are universal, by virtue of their similar nomenclature across jurisdictions and assumed common international law derivation, cannot be supported. In particular, salient lessons of comparative law are often ignored by scholarship that assumes environmental principles to be universal legal concepts. This was seen initially in Chapter 3 through the distinctive historical evolution of environmental principles and their varying groupings in different legal systems. The mapping of evolving EU and LEC doctrine involving environmental principles in Chapters 4 and 5 built on this to demonstrate how widely the legal identities of environmental principles may vary. Not only are different groups of environmental principles employed doctrinally in each jurisdiction, but they take on doctrinal roles that are contingent on the history, jurisdiction and constitutional roles of the different courts, their reasoning style and judicial attitude, and the openness of their pre-existing doctrine to influence by environmental principles. Environmental principles are thus not universal and equivalent legal concepts that are (or can be) simply translated across legal contexts.

Even when there are legal connections between environmental principles across jurisdictions – either through judicial cross-referral or similar patterns of doctrinal reasoning (as with the precautionary principle and its generation of a similar legal test or decision-making step in EU and LEC cases) – these do not give rise to doctrinal convergence. As indicated above, the distinctive doctrinal frameworks in each jurisdiction, involving different legal questions, different administrative law doctrine and different jurisdictional remits, mean that similar patterns of reasoning still present

different legal pictures in each body of law. At most, claims of universality for environmental principles might be a convenient shorthand for indicating how the global sustainable development agenda, with *its* environmental principles, might act as a spur for individual jurisdictions to generate jurisprudence around *their* environmental principles, and might give innovative judicial reasoning involving environmental principles a legitimising foothold (as in the LEC). However, any suggestion of legal equivalence of similarly-named environmental principles across jurisdictions is unjustified.

Second, any suggestion that law works instrumentally to deliver good environmental outcomes through its normative force, including through *legal* environmental principles, again fails to appreciate the complexity of legal frameworks and contexts in which legal principles might have a role, and the real world outcomes to which such roles might be causally connected. As seen in EU law, environmental principles do not act as free-standing legal grounds or standards that may be called in aid to ground legal actions in response to perceived environmental problems. Even in the LEC, where the Court has professed an intention to contribute to solving environmental problems through its ESD case law, the picture is not so simple. This is because ESD principles, as legally required considerations, may point in more than one direction in relation to an environmental problem; because it is not possible to determine through *legal* appraisal the (scientific) consequences of a particular legal decision for an environmental problem; and because environmental principles do not generate predictable and general responses to environmental problems. In this final sense, the maps of both EU and LEC case law demonstrated that environmental

principles give rise to marginal definitions or applications of the principles that are specific to the particular regulatory frameworks or (often complex) facts involved. There is thus no neat translation of environmental principles from policy ideas into legal concepts that drive solutions to environmental problems, with the imprimatur of the law to back them up.

Third, codifying hopes for environmental principles in environmental law scholarship mischaracterise environmental law as a fragmented body of law (along jurisdictional, regulatory, doctrinal and subject-matter lines) that should and can be unified through the simple legal construction of foundational principles. As seen in Chapter 4, for example, EU environmental law is an evolving and widespread body of EU jurisprudence that has both discrete aspects and elements that overlap with other areas of EU law, whether involving a range of areas of EU competence and regulatory subject-matters, different elements of EU law doctrine, or various actions before EU courts. In addition, issues of multi-level governance, when Member State action is legally implicated, complicate the legal picture. In part, this fragmented picture of EU environmental law is also driven by the varying roles of environmental principles themselves, as seen with the principles of sustainable development and integration and their distinctive doctrinal roles, and the selective use of environmental principles as interpretive aids. Rather than unifying EU environmental law, environmental principles are better understood as critical components of its evolution that are worthy of close legal analysis to determine and appraise the current state of EU environmental law.

The picture in LEC case law is different. While ESD principles do, through the deliberate doctrinal efforts of the LEC, unify its environmental law, the coherence this brings is specific to the unique jurisdiction and culture of this environmental court. It cannot be said that environmental principles universally or generically provide unifying foundations for environmental law; the precise legal context must be taken into account. In NSW law, it has taken concerted action by the Court, legislature and academics to place ESD principles at the heart of NSW environmental law. Even then, their central role does not overcome the wide variations in regulatory and factual scenarios with which the Court must deal – ESD principles provide a symbolically unifying core that drives and justifies the Court’s progressive reasoning, but they manifest in many different decision-making outcomes and applications on the facts, reinforcing the disparate nature of environmental law. Further, environmental principles do not provide universal foundations for unifying environmental law *across* jurisdictions, as the very different roles environmental principles in EU and LEC case law demonstrate.

Fourth, and involved in scholarly hopes that environmental principles might unify environmental law, pre-existing understandings of ‘legal principles’ from other areas of legal scholarship are often presumed to be applicable in analysing environmental principles, without justification that these are appropriate analytical frameworks. Such presumptions are made without sufficient appreciation of the novel and policy-based nature of environmental principles, or of the distinct nature of environmental law as a legal discipline. This is seen in EU law in relation to the easy elision made by some scholars between environmental principles and ‘general

principles of EU law'. The doctrinal analysis in Chapter 4 showed that, while there are some overlapping doctrinal features (for example, both act as interpretive aids), the doctrinal picture of environmental principles is more nuanced, and likely in a state of evolution. This is particularly evident in light of the complex ways in which environmental principles are employed to inform other EU review tests, including general principles of EU law such as proportionality.

In relation to jurisprudential understandings of 'legal principles', in particular the Dworkinian account, the maps in Chapters 4 and 5 again demonstrate the limitations of such theoretical ideas for environmental law. Not only are the legal roles of environmental principles across jurisdictions inconsistent, negating any general theoretical account of them, but the judicial use of environmental principles as 'policy' ideas to justify reasoning infringes a central postulate of Dworkin's model of proper judicial reasoning involving legal principles. While such authoritative jurisprudential accounts are tempting territory for environmental scholars to explore in analysing new environmental law developments and legitimising environmental law scholarship, they are methodologically awkward and ill-fitting.

Further, environmental law scholarship does not *need* such established scholarship to give it legitimacy. It needs methodological rigour on its own terms to meet the deep analytical challenges of the discipline and thus to establish scholarly legitimacy. Environmental law must grapple with problems of multi-jurisdictionality, interdisciplinarity (including legal interdisciplinarity), and a diverse subject-matter; a background of often pressing and controversial public policy problems to which it relates; and a raft of novel legal and regulatory concepts for which there are no pre-

established or obvious analytical frameworks. The study of environmental principles in environmental law involves all these challenges. This thesis has shown that doctrinal analysis of legal developments within, and in the terms of, individual legal cultures is a way to build an accurate picture of these novel concepts in environmental law. This is a conclusion and lesson for environmental law and its scholarship more broadly – environmental law is a rapidly evolving discipline, and there is much close contextual work to do in appreciating and appraising its evolution in doctrinal terms.

BIBLIOGRAPHY

BOOKS

- Alexy R, *A Theory of Constitutional Rights* (OUP, Oxford 2002).
- Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th edn, Lawbook Company, Pyrmont 2009).
- Bates G, *Environmental Law in Australia* (6th edn, Butterworths, Sydney 2006).
- Beder S, *Environmental Principles and Policies: An Interdisciplinary Introduction* (Earthscan, London 2006).
- Bell S and McGillivray D, *Environmental Law* (7th edn, OUP, Oxford 2008).
- Birnie P, Boyle A and Redgwell C, *International Law & the Environment* (3rd edn, OUP, Oxford 2009).
- Bookchin M, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Cheshire Books, 1982).
- Bosselmann K, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot 2008).
- Cane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance* (OUP, Oxford 2008).
- Cane P, *Administrative Tribunals and Adjudication* (Hart, Oxford 2010).
- Cappelletti M, *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford 1989).
- Chalmers D, Davies G and Monti G, *European Union Law* (2nd edn, Cambridge University Press, Cambridge 2010).
- Craig P and de Burca G, *EU Law: Text, Cases and Materials* (4th edn, OUP, Oxford 2008).
- Craig P, *EU Administrative Law* (OUP, Oxford 2006).
- Creyke R, McMillan J and Reynolds R, *Control of Government Action: Text Cases and Commentary* (LexisNexis Butterworths, Sydney 2005).
- de Sadeleer N, *Environmental Principles: From Political Slogans to Legal Rules* (OUP, Oxford 2002).
- de Sadeleer N, Roller G and Dross M (eds) *Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal* (Avosetta Series Europa Law Publishing, 2005).
- Dhondt N, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003).
- Dworkin R, *Taking Rights Seriously* (2nd edn, Duckworth, London 1978).
- Endicott T, *Administrative Law* (OUP, Oxford 2009).
- Evans M, *Principles of Environmental and Heritage Law* (Prospect Media, St. Leonards 2000).
- Fisher D, *Environmental Law: Text and Materials* (Law Book Co, 1994).

Fisher E, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007).

Flournoy A and Driesen D (eds) *Beyond Environmental Law: Policy Proposals for a Better Environmental Future* (Cambridge University Press Cambridge 2010).

Godden L and Peel J, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (OUP, South Melbourne 2010).

Harris J, *Legal Philosophies* (2nd edn, Butterworths, London 1997).

Hart H, *The Concept of Law* (2nd edn, Clarendon Press, Oxford 1994).

Holder J, *Environmental Assessment: The Regulation of Decision Making* (OUP, Oxford 2004).

Jans J and Vedder H, *European Environmental Law* (3rd edn, Europa Law Publishing, Groningen 2008).

Krämer L, *EC Environmental Law* (6th edn, Sweet & Maxwell, London 2007).

Lane W and Young S, *Administrative Law in Australia* (Lawbook Co., Pyrmont 2007).

Lee M, *EU Environmental Law: Challenges, Change and Decision-making* (Modern studies in European law, Hart, Oxford 2005).

Lovelock J, *The Vanishing Face of Gaia: A Final Warning* (Penguin, New York 2010).

MacCormick N, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1978).

MacCormick N, *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford 1994).

Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).

Maduro M, *We the Court: the European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart, Oxford 1998).

Marchant G and Mossman K, *Arbitrary and Capricious: The Precautionary Principle in the European Union Courts* (AEI Press, Washington DC 2004).

Meagher R, Heydon D and Leeming M, *Equity: Doctrines and Remedies* (4th edn, Butterworths, Sydney 2002).

Nelken D and Feest J (eds) *Adapting Legal Cultures* (Hart, Oxford 2001).

O'Riordan T and Cameron J (eds) *Interpreting the Precautionary Principle* (Cameron May, 1994).

Passmore J, *Man's Responsibility for Nature: Ecological Problems and Western Traditions* (Duckworth, 1974).

Pearson L, Harlow C and Taggart M, *Administrative Law in a Changing State* (Hart, Oxford 2008).

Philippopoulos-Mihalopoulos A, *Absent Environments: Theorising Environmental Law and the City* (Routledge-Cavendish, Abingdon 2007).

Rasmussen H, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers, Boston 1986).

Sands P, *Principles of International Environmental Law* (2nd edn, Cambridge University Press, Cambridge 2003).

Sheridan M and Lavrysen L (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002).

- Stallworthy M, *Understanding Environmental Law* (Understanding Law, Sweet & Maxwell, London 2008).
- Stephens T, *International Courts and Environmental Protection* (Cambridge University Press, Cambridge 2009).
- Sunstein C, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, Cambridge 2005).
- Tladi D, *Sustainable Development in International Law* (Pretoria University Press, Cape Town 2007).
- Tridimas T, *The General Principles of EU Law* (2nd edn, OUP, Oxford 2006).
- Ward B and Dubos R, *Only One Earth: The Care and Maintenance of a Small Planet* (United Nations Conference on the Human Environment (1972 : Stockholm, Sweden) Penguin, 1972).
- Weale A, *The New Politics of Pollution* (Manchester University Press, Manchester 1992).
- Weiss E, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Transnational Publishers, Tokyo 1989).
- Wolf S and Stanley N, *Wolf and Stanley on Environmental Law* (Routledge-Cavendish, 2010).

BOOK CHAPTERS

- Antharvedi U, 'Environment: Principles and Interpretation of the Judiciary' in Antharvedi U (ed) *Environmental Law: Principles and Governance* (Icfai University Press, Hyderabad 2007).
- Bates G, 'Legal Perspectives' in Dovers S and Wild River S (eds) *Managing Australia's Environment* (The Federation Press, 2003).
- Beyerlin U, 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules' in Bodansky D, Brunnâee J and Hey E (eds) *The Oxford Handbook of International Environmental Law* (OUP, Oxford 2007).
- Boer B, 'Implementation of International Sustainability Imperatives at a National Level' in Ginther K, Denters E and de Waart P (eds) *Sustainable Development and Good Government* (Martinus Nijhoff Publishers, London 1995).
- Bosselmann K, 'Ecological Justice and Law' in Richardson B and Wood S (eds) *Environmental Law for Sustainability: A Reader* (Hart, Oxford 2006).
- Brennan G, 'The Anatomy of an Administrative Decision' in Creyke R, McMillan J and Reynolds R (eds) *Control of Government Action: Text Cases and Commentary* (LexisNexis Butterworths, Sydney 2005).
- Cane P, 'The Making of Australian Administrative Law' in Cane P (ed) *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Sydney 2004).
- Cane P, 'Understanding Administrative Adjudication' in Pearson L, Harlow C and Taggart M (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008).
- Cotterrell R, 'Is there a Logic of Legal Transplants?' in Nelken D and Feest J (eds) *Towards a Sociology of Legal Adaptation* (Hart, Oxford 2001).

- Crawford J, 'The Constitution' in Bonyhady T (ed) *Environmental Protection and Legal Change* (Federation Press, Annandale 1992).
- Creyke R and McMillan J, 'Soft Law v Hard Law' in Pearson L, Harlow C and Taggart M (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008).
- Cripps J, 'Administrative Law' in Bonyhady T (ed) *Environmental Protection and Legal Change* (Federation Press, Annandale 1992).
- Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Reimann M and Zimmerman R (eds) *The Oxford Handbook of Comparative Law* (OUP, Oxford 2006).
- Dhondt N, 'Environmental Law Principles and the Case Law of the Court of Justice' in Sheridan M and Lavrysen L (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002).
- Dovers S, 'Institutionalising ESD: What Happened, What Did Not, Why and What Could Have?' in Hamilton C and Throsby D (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998).
- Epiney A, 'Environmental Principles' in Macrory R (ed) *Reflections on 30 Years of EU Environmental Law* (Europa Law Publishing, Groningen 2006).
- Fisher E, 'Administrative Law, Pluralism and the Legal Construction of Merits Review in Australian Environmental Law' in Pearson L, Harlow C and Taggart M (eds) *Administrative Law in a Changing State* (Hart, Oxford 2008).
- Gilbert C, 'Future Directions in Commonwealth Environmental Law' in Duncan W (ed) *Planning and Environmental Law in Queensland* (Federation Press, Sydney 1993).
- Gilhuis P, 'The Consequences of Introducing Environmental Law Principles in National Law' in Sheridan M and Lavrysen L (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002).
- Gullett W, 'The Threshold Test of the Precautionary Principle in Australian Courts and Tribunals: Lessons for Judicial Review' in Fisher E, Jones J and Schomberg R (eds) *Implementing the Precautionary Principle: Perspectives and Prospects* (Edward Elgar, Cheltenham 2006).
- Handl G, 'Sustainable Development: General Rules versus Specific Obligations' in Lang W (ed) *Sustainable Development and International Law* (Graham & Trotman, 1995).
- Harris S and Throsby D, 'The ESD Process: Background, Implementation and Aftermath' in Hamilton C and Throsby D (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998).
- Heinzerling L, 'The Environment' in Cane P and Tushnet M (eds) *The Oxford Handbook of Legal Studies* (OUP, Oxford 2003).
- Jacobs M, 'Sustainable Development as a Contested Concept' in Dobson A (ed) *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (OUP, Oxford 1999).
- Krämer L, 'The Genesis of EC Environmental Principles' in Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).

- Legrand P, 'What "Legal Transplants"? ' in Nelken D and Feest J (eds) *Adapting Legal Cultures* (Hart, Oxford 2001).
- Lowe V, 'Sustainable Development and Unsustainable Arguments' in Boyle A and Freestone D (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (OUP, 1999).
- Macrory R, 'Principles into Practice' in Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).
- Maes F, 'Environmental Law Principles, Their Nature and the Law of the Sea: A Challenge for Legislators' in Sheridan M and Lavrysen L (eds) *Environmental Law Principles in Practice* (Bruylant, Brussels 2002).
- McCrudden C, 'Judicial Comparativism and Human Rights' in Orucu E and Nelken D (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007).
- Nelken D, 'Towards a Sociology of Legal Adaptation' in Nelken D and Feest J (eds) *Adapting Legal Cultures* (Hart, Oxford 2001).
- Nelken D, 'Defining and Using the Concept of Legal Culture' in Orucu E and Nelken D (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007).
- Orucu E, 'Developing Comparative Law' in Orucu E and Nelken D (eds) *Comparative Law: A Handbook* (Hart, Oxford 2007).
- Papadakis E, 'The ESD Process and Agenda 21' in Hamilton C and Throsby D (eds) *The ESD Process: Evaluating a Policy Experiment* (Academy of Social Sciences, ANU, Canberra 1998).
- Preston B, 'The Role of Courts in relation to Adaptation to Climate Change' in Bonyhady T, McDonald J and Macintosh A (eds) *Adapting to Climate Change: Australian Law and Policy* (Federation Press, Annandale 2010).
- Routely AV, 'Human Chauvinism and Environmental Ethics' in Mannison D, McRobbie M and Routley R (eds) *Environmental Philosophy* (Dept. of Philosophy, Research School of Social Sciences, Australian National University, 1980).
- Scott J, 'The Precautionary Principle before the European Courts' in Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).
- Scott J and Vos E, 'The Juridification of Uncertainty: Observations on the Ambivalence of the Precautionary Principle within the EU and the WTO' in Joerges C and Dehousse R (eds) *Good Governance in Europe's Integrated Market* (OUP, 2002).
- Stein P and Mahony S, 'Incorporating Sustainability Principles into Legislation' in Leadbeter P, Gunningham N and Boer B (eds) *Environmental Outlook No 3: Law and Policy* (Federation Press, Leichhardt 1999).
- Tickner J and Kriebel D, 'The Role of Science and Precaution in Environmental and Public Health Policy' in Fisher E, Jones J and von Schomberg R (eds) *Implementing the Precautionary Principle: Perspectives and Prospects* (MPG Books, Cornwall 2006).
- Wegner B, 'Principles into Practice - The German Case' in Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).

Wilkinson D, 'Using Environmental Ethics to Create Ecological Law' in Holder J and McGillivray D (eds) *Locality and Identity: Environmental Issues in Law and Society* (Ashgate, Aldershot 1999).

Winter G, 'The Legal Nature of Environmental Principles in International, EC and German Law' in Macrory R, Havercroft I and Purdy R (eds) *Principles of European Environmental Law* (Europa Law Publishing, Groningen 2004).

JOURNAL ARTICLES

Bayne P, 'The Proposed Administrative Review Tribunal – Is There a Silver Lining in the Dark Cloud?' (2000) 7 AJAdminL 86.

Bodansky D, 'Customary (and Not So Customary) International Environmental Law' (1995) 3 Ind J Global Legal Stud 105.

Boer B, 'Social Ecology and Environmental Law' (1984) 1 Environmental and Planning Law Journal 233.

Boer B, 'Institutionalising Ecologically Sustainable Development: The Roles of National, State, and Local Governments in Translating Grand Strategy into Action' (1995) 31 Willamette L Rev 307.

Boer B, 'The Rise of Environmental Law in the Asian Region' (1999) 32 U Rich L Rev 1503.

Boon F, 'The Rio Declaration and its Influence on International Environmental Law' [1992] Singapore Journal of Legal Studies 347.

Burton C, 'The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine' (1998) 22 Harv Envtl L Rev 509.

Cane P, 'Merits Review and Judicial Review-The AAT as a Trojan Horse' 28 FL Rev 213.

Carnwath R, 'Environmental Enforcement: the Need for a Specialist Court' [1992] JPEL 799.

Carnwath R, 'Judicial Protection of the Environment: At Home and Abroad' (2004) 16(3) JEL 315.

Cheyne I, 'The Precautionary Principle in EC and WTO Law: Searching for a Common Understanding' (2006) 8(4) Env LR 257.

Chinkin C, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 Int'l & Comp LQ 850.

Christoforou T, 'Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty' [2000] NYU Envtl LJ 622.

Cowdroy D, 'The Land and Environment Court of New South Wales - A Model for the United Kingdom?' [2002] JPEL 59.

Curran G and Hollander R, 'Changing Policy Mindsets: ESD and NCP Compared' 9(3) Australian Journal of Environmental Management 158.

de Sadeleer N, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12(2) European Law Journal 139.

Doherty M, 'The Status of the Principles of EC Environmental Law: Gianni Bettati against Safety High Tech' (1999) 11(2) JEL 354.

Doherty M, 'The Judicial Use of the Principles of EC Environmental Policy' (2000) 2(4) Env LR 251.

Doherty M, 'Hard Cases and Environmental Principles: An Aid to Interpretation?' (2004) 3 YEEL 57.

Doremus H, 'The Rhetoric and Reality of Nature Protection: Toward a New Discourse' 57 Wash & Lee L Rev 11.

Ellis J, 'Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle' (2006) 17 Eur J Int'l L 445.

Feintuck M, 'Precaution Maybe, but What's the Principle? The Precautionary Principle, the Regulation of Risk, and the Public Domain' 32(3) JLS 371.

Fennelly N, 'Preserving the Legal Coherence Within the New Treaty' 5 Maastricht Journal of European and Comparative Law 185.

Fisher E, 'Is the Precautionary Principle Justiciable?' (2001) 13(3) JEL 317.

Fisher E, 'Precaution, Precaution Everywhere: Developing a "Common Understanding" of the Precautionary Principle in the European Community' (2002) 9(1) Maastricht Journal of European and Comparative Law 7.

Fisher E, 'Food Safety Crises as Crises in Administrative Constitutionalism' (2010) 20 Health Matrix; Journal of Law-Medicine (forthcoming).

Fisher E and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) JEL 213.

Fisher E, Pascual P and Wagner W, 'Understanding Environmental Models in their Legal and Regulatory Context' (2010) 22(2) JEL 251.

Fleming G, 'Administrative Review and the "Normative" Goal - Is Anybody Out There?' 28 FL Rev 61.

Gardner A, 'Federal Intergovernmental Co-operation on Environmental Management: A Comparison of Developments in Australia and Canada' 11(2) Environmental and Planning Law Journal 104.

Gleeson M, 'Judicial Legitimacy' (2000) 20 AustBarRev 4.

Hartley T, 'The European Court, Judicial Objectivity and the Constitution of the European Union' 112 LQR 95.

Hilson C, 'Rights and Principles in EU Law: A Distinction without Foundation?' (2008) 15(2) Maastricht Journal of European and Comparative Law 193.

Humphreys M, 'The Polluter Pays Principle in Transport Policy' 26(5) ELR 451.

Jacobs F, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18 JEL 185.

Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

Ladeur K, 'The Introduction of the Precautionary Principle into EU law: A Pyrrhic Victory for Environmental and Public Health Law? Decision-making Under Conditions of Complexity in Multi-level Political Systems' (2003) 40(6) Common Market Law Review 1455.

- Lang W, 'UN Principles and International Environmental Law' 3 Max Planck Yrbk UN L 171.
- Lee M, 'Sustainable Development in the EU: The Renewed Sustainable Development Strategy 2006' 9(1) Env LR 41.
- Legrand P, 'European Legal Systems are not Converging' (1996) 45 Int'l & Comp LQ 52.
- Lipman Z, 'The NSW Land and Environment Court: reforms to the Merit Review Process' 21 Environmental and Planning Law Journal 415.
- Lyster R and Coonan E, 'The Precautionary Principle: A Thrill Ride on the Roller Coaster of Energy and Climate Law' (2009) 18(1) RECIEL 38.
- Majone G, 'What Price Safety? The Precautionary Principle and its Policy Implications' (2002) 40(1) Journal of Common Market Studies 89.
- Marong A, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' 16 Geo Int'l Env'tl L Rev 21.
- McAuslan P, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3(2) JEL 195.
- McIntyre O and Mosedale T, 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 JEL 221.
- Moffet J and Bregha F, 'The Role of Law in the Promotion of Sustainable Development' (1996) 6 Journal of Environmental Law and Practice 3.
- Morgan G, 'The Dominion of Nature: Can Law Embody a New Attitude?' (1993) 18(60) Bulletin of the Australian Society of Legal Philosophy 43.
- Pallemmaerts M, 'International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process' (1995-6) 15 JL & Com 623.
- Palmer G, 'New Ways to Make International Environmental Law' (1992) 86(2) The American Journal of International Law 259.
- Pearlman M, 'The Land and Environment Court of New South Wales a Model for Environmental Protection' 123 Water, Air and Soil Pollution 395.
- Pearson L, 'Incorporating ESD Principles in Land-Use Decision-Making: Some Issues After Teoh' (1996) 13 Environmental and Planning Law Journal 47.
- Pearson L and Williams P, 'The New South Wales Planning Reforms: Undermining External Merits Review of Land-Use Decision-Making?' 26 Environmental and Planning Law Journal 19.
- Peel J, 'Ecologically Sustainable Development: More Than Mere Lip Service?' (2008) 12(1) Australasian Journal of Natural Resources Law and Policy 1.
- Peterson D, 'Precaution: Principles and Practice in Australian Environmental and Natural Resource Management' 50 The Australian Journal of Agricultural and Resource Economics 469.
- Plater Z, 'From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law' 27 Loyola Los Angeles Law Review 981.

Preston B, 'The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific' (2005) 9(2) *Asia Pac J Envtl L* 109.

Preston B, 'Environmental Law 1927-2007: Retrospect and Prospect' (2007) 81 *ALJ* 616.

Preston B, 'Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales' 25(6) *Environmental and Planning Law Journal* 385.

Raz J, 'Legal Principles and the Limits of the Law' [1972] *Yale LJ* 823.

Robinson N, 'IUCN as Catalyst for a Law of the Biosphere: Acting Globally and Locally' 35 *Envtl L* 249.

Rodriguez-Rivera L, 'Is the Human Right to Environment Recognised Under International Law? It Depends on the Source' 12(1) *Columbia Journal of International Environmental Law and Policy* 1.

Ross A, 'Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in the UK and Scottish Statutes' (2008) 20(1) *JEL* 35.

Ross A, 'Modern Interpretations of Sustainable Development' 36(1) *JLS* 32.

Ruhl J, 'Sustainable Development: A Five-Dimensional Algorithm for Environmental Law' 18 *Stan Envtl LJ* 31.

Ryan P, 'Court of Hope and False Expectations: Land and Environment Court 21 Years On' 14(3) *JEL* 301.

Scotford E, 'Trash or Treasure: Policy Tensions in EC Waste Regulation' (2007) 19(3) *JEL* 367.

Scotford E, 'Mapping the Article 174(2) Case Law: A First Step to Analysing Community Environmental Law Principles' (2008) 8 *YEEL* 1.

Scotford E, 'The New Waste Directive - Trying to Do it All... An Early Assessment' 11(2) *Env LR* 75.

Scott J, 'Law and Environmental Governance in the EU' (2002) 51 *Int'l & Comp LQ* 996.

Scott J and Sturm S, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2006-7) 13 *Colum J Eur L* 565.

Silveira M, 'International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring' (1995) 31 *Willamette L Rev* 239.

Slaughter A-M, 'The Real New World Order' (1997) 76(5) *Foreign Affairs* 183.

Smith S, 'Ecologically Sustainable Development: Integrating Economic, Ecology, and Law' 31 *Willamette L Rev* 261.

Smyth M, 'Inquisitorial Adjudication: the Duty to Inquire in Merits Review Tribunals' (2010) 34(1) *MULR* (forthcoming).

Soriano L, 'A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice' (2003) 16(3) *Ratio Juris* 296.

Stein E, '"Lawyers", Judges & the Making of a Transnational Constitution?' 75 *AJIL* 1.

Stein P, 'Turning Soft Law into Hard - An Australian Experience with ESD Principles in Practice' (1997) 3(2) *The Judicial Review* 91.

Stein P, 'Are Decision-Makers Too Cautious with the Precautionary Principle?' (2000) 17(6) *Environmental and Planning Law Journal* 3.

Stein P, 'Specialist Environmental Courts: the Land and Environment Court of New South Wales, Australia' 4 *Env LR* 5.

Stephens T, 'Multiple International Courts and the 'Fragmentation' of International Environmental Law' (2006) 25 *Australian Year Book of International Law* 227.

Stone D, 'Is There a Precautionary Principle?' (2001) 31(7) *Environmental Law Reporter* 10790.

Taggart M, "'Australian Exceptionalism" in Judicial Review' 36(1) *FL Rev* 1.

Tarlock A, 'Ideas Without Institutions: The Paradox of Sustainable Development' 9 *Ind J Global Legal Stud* 35.

Tarlock A, 'The Future of Environmental Rule of Law Litigation' (2002) 19 *Pace Env'tl L Rev* 575.

Tarlock A, 'Is There a There There in Environmental Law?' 19 *J Land Use & Env'tl L* 213.

Tribe L, 'Ways Not To Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83(7) *Yale LJ* 1315.

Tromans S, 'High Talk and Low Cunning: Putting Environmental Principles into Legal Practice' [1995] *JPEL* 779.

Verschuuren J, 'Sustainable Development and the Nature of Environmental Legal Principles' (2006) 9(1) (*Potchefstroom Electronic Law Journal*) <<http://www.saflii.org/za/journals/PER/2006/6.html>> accessed: 14 September 2010 209.

Waite A, 'The Quest for Environmental Law Equilibrium' 7 *Env LR* 34.

Weatherill S, 'Publication Review: "Free Movement of Goods in the European Community" (Peter Oliver)' (2003) 28(5) *ELR* 756.

Weiler J, 'The Transformation of Europe' 100 *Yale LJ* 2403.

Weiler J, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' 31(4) *Journal of Common Market Studies* 417.

Weimer M, 'Applying Precaution in EU Authorisation of Genetically Modified Products-Challenges and Suggestions for Reform' 16(5) *European Law Journal* 624.

Whitmore H, 'Commentary' (1981) *FL Rev* 117.

Williams P, 'The Land and Environment Court's Planning Principles: Relationship with Planning Theory and Practice' 22(6) *Environmental and Planning Law Journal* 401.

Woolf H, 'Judicial Review: A Possible Programme for Reform' [1992] *PL* 221.

Wyman L, 'Acceptance of the Precautionary Principle - Australian v International Decision-Makers' (2001) 18 *EPLJ* 395.

POLICY DOCUMENTS

1972 Council Recommendation on Guiding Principles concerning International Aspects of Environmental Policies, OECD, C(72) 128 final

1974 Council Recommendation on the Implementation of the Polluter Pays Principle, OECD, C(74) 223 final

UNEP, 'Johannesburg Principles on the Role of Law and Sustainable Development', Global Judges Symposium, Johannesburg, South Africa, 18-20 August 2002

International Law Association, New Delhi Declaration on the Principles of International Law Related to Sustainable Development (London, 2002; ILA Resolution 2/2002)

'Programme of Action of the EC on the Environment' [1973] OJ C112/1

5th EC Environmental Action Programme, 'Towards Sustainability' [1993] OJ C138/5

Commission of the European Communities, 'Communication from the Commission on a Partnership for Integration – A Strategy for Integrating the Environment into EU Policies', COM (98) 333

Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle', COM (2000) 1

Commission of the European Communities, 'Communication from the Commission on the Precautionary Principle', COM (2000) 1

European Commission, 'Towards a Global Partnership for Sustainable Development' COM (2002) 83 final

Council of the European Union, Brussels European Council 16/17 June 2005, Presidency Conclusions, 10255/1/05 Rev 1

Council of the European Union, 'Renewed Sustainable Development Strategy' (2006) Document 109/7/06

Commission Communication, 'Mainstreaming Sustainable Development into EU Policies: 2009 Review of the EU Sustainable Developments'; COM (2009) 400 final

Final Report of the Australian Constitutional Commission (Australian Government Publication Services 1988)

Commonwealth of Australia, 'Ecologically Sustainable Development: A Commonwealth Government Discussion Paper' (Australian Government Publication Services, 1990)

Ecologically Sustainable Development Working Groups, *Final Reports* (9 volumes) (Australian Government Publication Services 1991)

Ecologically Sustainable Development Steering Committee 'National Strategy for Ecologically Sustainable Development' (Australian Government Publication Services, 1992)

Productivity Commission 'Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies: Report No.5' (Ausinfo, Canberra 25 May 1999)

Grant M, Dept of the Environment, Transport & Regions (UK), *Environment Court Project Final Report* (2000)

CONFERENCE PAPERS, SPEECHES, NEWSPAPER ARTICLES AND WEBSITES

Ash D, 'Free the Fourth Arm' *Sydney Morning Herald* (Sydney 23-24 August 2008) 32.

Cameron J, Pevato P and Abouchar J, 'International Implementation of the Principles' (1994) Fenner Conference on the Environment - Sustainability: Principles to Practice (Department of Environment, Sport and Territories, Australian Commonwealth Government).

Farrier D and Fisher E, 'Reconstituting Decision Making Processes and Structures in Light of the Precautionary Principle' (1993) The Precautionary Principle (Institute of Environmental Studies, The University of New South Wales).

Preston B, 'Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia' (2006) Regional Presidents Meeting, Law Society of New South Wales (<[http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/\\$file/Speech_21Jul06_Preston.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Speech_21Jul06_Preston.pdf/$file/Speech_21Jul06_Preston.pdf)> accessed 16 September 2010).

Harding R, Young M and Fisher E, 'Interpretation of Principles' (Fenner Conference on the Environment - Sustainability: Principles to Practice 1994).

Roseth J, 'Developing Planning Principles', Talk delivered at the NEERG Seminar on Planning Principles, Wednesday 27 July 2005 (<http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> (accessed 1 October 2010)).

Roseth J 'Planning Principles and Consistency of Decisions', Talk delivered to the Law Society's Local Government and Planning Law Seminar, 15 February 2005 (<http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples> (accessed 30/9/10)).