



Sustainable Development in International Law

Jorge E. Viñuales



C-EENRG Working Papers 2018-3

December 2018

The **Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG, read ‘synergy’)** was established in 2014 within the Department of Land Economy in order to conduct integrative research on the governance of sustainability transitions, such as the climate-driven transition from a carbon-intensive inefficient energy matrix to a decarbonised and efficient one, or the water/population-driven transformation of food production systems or, still, the broader implications of the transition from the Holocene to the Anthropocene for human knowledge and organisation. C-EENRG approaches interdisciplinary from a problem-driven rather than a discipline-driven perspective, relying on those methodologies and analytical frameworks most useful to understand and address a given problem.

C-EENRG hosts researchers across disciplines, including law, economics, policy, and modelling, and welcomes research on a wide range of environmental topics across the food-energy-water-land nexus.

SCIENTIFIC COMMITTEE

Professor Laura Diaz Anadon	<i>Climate policy, economics and transitions</i>
Professor Andreas Kontoleon	<i>Economics and biodiversity</i>
Dr Shaun Larcom	<i>Economics and biodiversity</i>
Dr Emma Lees	<i>Law and governance</i>
Dr Jean-François Mercure	<i>Modelling and transitions</i>
Dr Pablo Salas	<i>Modelling and transitions</i>
Professor Jorge E. Viñuales	<i>Law, governance and transitions</i>

Sustainable Development in International Law

Jorge E. Viñuales*

I. INTRODUCTION

Sustainable development is the main concept underpinning our policy response to the environmental crisis the world faces. As such, it is pervasive in all sorts of documents, writings and discourse, including legal ones and, within the latter, international legal instruments.¹ Its ubiquitous character is only matched by its vagueness; and its vagueness is a deliberate choice driven by its function, which is to rally rather than to divide.²

This chapter examines the concept of sustainable development specifically from the perspective of international law. It investigates three main aspects: (1) the conceptual history of sustainable development; (2) the legal meaning attached to this concept; and, on the basis of these two aspects, also (3) the nature, functions and practical operation of sustainable development in international legal practice. The

* Harold Samuel Professor of Law and Environmental Policy, University of Cambridge.

¹ See J. Juste Ruiz, V. Bou Franch and F. Pereira Coutinho (eds.), *Desarrollo Sostenible y Derecho Internacional* (Valencia: Tirant lo Blanch, 2018); V. Barral and P.-M. Dupuy, 'Principle 4: Sustainable Development through Integration', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 157-179; V. Barral, *Le développement durable en droit international* (Paris: LGDJ, 2015); K. Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Tübingen: Mohr Siebeck, 2011); C. Voigt, *Sustainable Development as a Principle of International Law* (Leiden: Martinus Nijhoff, 2009); D. B. Magraw and L. D. Hawke, 'Sustainable Development', in D. Bodansky, E. Hey, J. Brunnée (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2008), pp. 613-638; N. Schrijver, 'The Evolution of Sustainable Development in International Law' (2007) 329 *RCADI* 217-412; F. Francioni, 'Sviluppo sostenibile e principi di diritto internazionale nell'ambiente', in SIDI, *Il principio dello sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente* (XI Convegno, Napoli, 2007), pp. 41-62; M. Nobre and M. C. Amazonas (eds.), *Desenvolvimento sustentável: a institucionalização de um conceito* (Brasília: Edições IBAMA, 2002); V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development* (Oxford University Press, 1999), pp. 19-37; P. Sands, 'International Law in the Field of Sustainable Development' (1994) 65 *BYBIL* 303.

² See J. E. Viñuales, 'The Rise and Fall of Sustainable Development' (2013) 22 *RECIEL* 3.

emphasis is placed on (2) and (3) because (1) is examined in detail elsewhere in this volume.³

One major challenge that must be overcome when writing about sustainable development, as for some other questions relating to the protection of the environment in international law, is the conceptual fog coating a large part of the work on this area, which has on occasion permeated the practice. This is partly due to the deliberate vagueness of the concept, which lends itself to far too many (mis-)interpretations. To navigate this difficulty, one must strike a balance amongst three competing considerations, namely the conceptual aspects of sustainable development (which sometimes misrepresent its legal use), the actual practice in the use of this concept (which is sometimes incoherent and difficult to conceptualise clearly), and its inherent ethical dimension (which, beyond the 'conceptualisation' of what the 'practice' of sustainable development 'is', requires a view of what sustainable development 'should' be). I cannot claim that this chapter solves this constantly evolving set of equations, but they have been specifically taken into account. Specifically, the balance struck in this chapter prioritises actual practice, with the normative dimension and the conceptual clarity coming in the second and third place, respectively. This will become clearer as the discussion unfolds.

II. THE CONCEPT OF SUSTAINABLE DEVELOPMENT IN HISTORICAL PERSPECTIVE

Historically, the concept of 'sustainable development' is a newcomer. Although it was in use already in 1980⁴ and perhaps earlier, it was only brought to the centre stage of global environmental governance much later, between 1987 and 1992. This period saw the transformation of sustainable development from a policy proposal made in the influential report of the Brundtland Commission, *Our Common Future*,⁵ into the conceptual epicentre of global environmental governance, at the 1992 Rio Conference on Environment and Development. The Rio Conference and, particularly, the Rio Declaration on Environment and Development,⁶ brought the concept of sustainable development to the forefront, as the embodiment of a compromise between two – still – competing considerations, namely development (whether economic or social) and environmental protection.

Before 1992, the important tension between these two considerations had received less consensual articulations. The first such attempt was made at a meeting

³ See the chapter by P. Sand in this volume.

⁴ IUCN, UNEP, WWF, World Conservation Strategy. Living Resource Conservation for Sustainable Development (1980).

⁵ *Report of the World Commission on Environment and Development, Our Common Future* (10 March 1987).

⁶ Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26.Rev.1

held in Founex, in the outskirts of Geneva, one year before the 1972 Stockholm Conference on the Human Environment. At Founex, a fragile conceptual truce was reached between development and environment, whereby the primary environmental responsibility of developing and newly independent countries was deemed to be development, not environmental protection.⁷ What may appear odd at first sight is better explained by reference to the famous address of Indira Gandhi, then India's prime minister, at the Stockholm Conference: '[a]re not poverty and need the greatest polluters? [...] The environment cannot be improved in conditions of poverty'.⁸ Later on, conveying the suspicion of many developing countries at the time, she added that '[i]t would be ironic if the fight against pollution were to be converted into another business, out of which a few companies, corporations, or nations would make profits at the cost of the many'.

The Founex approach, which consisted in essence to acknowledge that, for developing and newly independent countries, development policy prevailed over (or was to be equated with) environmental policy, was not the only solution to the environment-development equation considered in the early years of global environmental governance. Other concepts were proposed, each representing a deeper strand of thought, including the concepts of 'degrowth',⁹ 'eco-development'¹⁰ and even the 'green economy', which was first launched in the 1980s¹¹ and made a comeback after the 2008 economic. These concepts and their associated programmes can be organised along a spectrum ranging from de-growth, which questioned the very idea of growth and development, to the green economy, which essentially presented environmental policy as the best industrial policy approach to achieve prosperity. Concepts such as eco-development, which came to represent the Founex approach, and sustainable development, where somewhere between the two poles of the spectrum. Thus, from the standpoint of conceptual history, sustainable development was but one contender among several others, at least until the Brundtland Commission selected it as the synthesis concept for its report and the Rio Conference confirmed its central position.

⁷ *The Founex Report on Development and Environment*, Founex, Switzerland, 4-12 June 1971, paras. 1.4 and 1.5.

⁸ 'Man and Environment', Smt. Indira Gandhi (late Prime Minister of India) Plenary Session of United Nations Conference on Human Environment Stockholm 14th June 1972.

⁹ For founding works see N. Georgescu-Roegen, *The Entropy Law and the Economic Process* (Cambridge MA: Harvard University Press, 1971); N. Georgescu-Roegen, *Demain la décroissance: entropie-écologie-économie, préface et présentation d'Ivo Rens et Jacques Grinevald* (Lausanne: Favre, 1979).

¹⁰ See K. Mellos, *Perspectives on Ecology. A Critical Essay* (London: Palgrave Macmillan, 1988), chapter 3. For a founding work see I. Sachs, *Stratégies de l'écodéveloppement* (Paris: Editions économie humanisme, les éditions ouvrières, 1980).

¹¹ See D. W. Pearce, A. Markandya and E. B. Barbier, *Blueprint for a Green Economy* (London: Earthscan, 1989).

As a conceptual synthesis, sustainable development offered two major advantages. First, it was less associated with a specific stance or country group than 'eco-development' or the 'green economy'. Secondly, the very vagueness of the concept made it malleable enough to rally all countries to the cause right after the end of the Cold War, in what appeared to be a unique window for global normative re-organisation. A quarter of a century after the 1992 Rio Conference, one can better appreciate the merits and the shortcomings of such a conceptual bet. The bet indeed paid off as far as normative development is concerned. Since the 1990s, virtually all countries have rallied behind the concept of sustainable development and that, in turn, has facilitated the adoption of several treaty regimes bringing together developed and developing countries. Yet, that convening power was premised on what could be called the 'original sin' of sustainable development: its deliberate vagueness. Such vagueness has become a major obstacle in attempts to go beyond the mere adoption of new law and into its effective implementation. Countries have harnessed the concept of sustainable development to pursue essentially any economic strategy, however inconsistent, in its actual implementation, with a genuine effort to protect the environment. Even when a genuine attempt at curbing environmental degradation has been made, policies have tackled the 'negative externality' and not the 'transaction'. In other words, as further discussed in the last section of this chapter, environmental law has taken the form of an additional layer of law (tackling the externality) added on top of a core body of law (e.g. property, corporate law, contract law and, at the international level, trade and investment law) which organises the underlying transaction. The two layers still remain distinct and the inroads of the 'law of externalities' into the 'law of transactions' remain limited. This is why I believe, as I wrote years ago, that sustainable development is turning brownish; its core strength – vagueness – has become its main weakness.

The conceptual evolution of global environmental governance, and the place of sustainable development within it, can be summarised graphically as follows:

Figure 1: The conceptual evolution of sustainable development¹²

[Figure 1 about here]

¹² Source: Viñuales, above n. 2.

Figure 1 draws a line that starts with a view of nature as a 'natural resource' to be exploited for the benefit of each State, epitomised by UN General Assembly Resolution 1803(XVII) on 'Permanent Sovereignty over Natural Resources',¹³ and ends with our current horizon, the sustainable development goals (SDGs) adopted in 2015 as the core of the 2030 Agenda for Sustainable Development.¹⁴ The integrated and participative nature of the SDGs must certainly be praised. 'Development' no longer refers to the situation of 'developing' countries but, as presently understood, it also encompasses 'growth' and it is hence applicable also to developed countries. In other words, 'development' now means prosperity. The SDGs provide a momentous and, in practice, influential guide for action for all countries. But at no point in the entire strategy is environmental protection clearly and unambiguously prioritised over economic and social development. The horizon remains the same as the one envisioned by Indira Gandhi in her 1972 when she mentioned her 'good fortune of growing up with a sense of kinship with nature in all its manifestations' and, yet, she immediately added '[b]ut my deep interest in this our "only earth" was not for itself but as a fit home for man.' Contrary to what she hoped to justify in her address as well as to what the SDGs still set as our policy horizon, we may have reached a point where environmental policy amounts to development policy. This is the broad context in which international environmental law must operate and where the legal concept of sustainable development 'should' be understood.

III. 'SUSTAINABLE' DEVELOPMENT FROM A LEGAL STANDPOINT

The determination of the legal content of the concept of sustainable development presupposes two premises, which, in turn, can only be derived from an empirical inquiry. The first premise is that sustainable development is not only a concept but also a 'norm' and, more specifically, a norm of international law. The second is that the legal content of such a norm can be sufficiently ascertained.

The first premise can be derived from a simple observation, namely that the concept of sustainable development has been referred to in legal practice, not only in a range of policy instruments¹⁵ but also in treaties¹⁶ and, perhaps more importantly for

¹³ 'Permanent Sovereignty over Natural Resources', 14 December 1962, UN Doc. A/RES/1803/XVII.

¹⁴ Resolution 70/1, 'Transforming our World: The 2030 Agenda for Sustainable Development', 21 October 2015, UN Doc. A/RES/70/1.

¹⁵ Rio Declaration, above n. 6; Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol. 1), Resolution 1, Annex 2: Agenda 21 (Agenda 21); Resolution 1: 'Political declaration', 4 September 2002, Report of World Summit on Sustainable Development in Johannesburg (South Africa), 26 August to 4 September 2002, UN Doc. A/CONF.199/20, p. 1, 2002 (Political Declaration); Report of the World Summit on Sustainable Development at Johannesburg (South Africa), 26 August–4 September 2002, UN Doc. A/CONF.199/20 (Implementation Plan); 'The Future We Want', 11 September 2012, UN Doc. A/Res/66/288; 2030 Agenda for Sustainable Development, above n. 14.

¹⁶ See below [Section IV.B.2].

present purposes, in judicial decisions.¹⁷ Such references are not merely descriptive, as could be the reference to a certain fact or set of facts (e.g. the Cold War or the development disparities or, still, an emergency situation); they refer to sustainable development as a norm, understood as a prescriptive or permissive proposition the invocation of which entails legal effects (prescribes or permits the operation of other interlocked norms).¹⁸ I will investigate the nature, identity (across legal sources) and operation of such a norm in [Section IV]. For now, it is sufficient to observe that sustainable development is not merely a concept, such as degrowth, eco-development or the green economy, but a normative concept.

The second premise assumes the first but goes a step further. It holds that, as a norm, sustainable development has a distinctive content or, in other words, content that makes it identifiable. The ascertainment of this content involves two separate inquiries. First, one must determine the content of this norm in a discursive context where there are competing accounts of it. Secondly, and most importantly, one must identify the process or method followed to determine the content of the norm. Different processes are likely to lead not only to different contents but also to different normative implications. For this reason, the second inquiry is more fundamental than the first and, as noted earlier in this chapter, I shall prioritise here actual practice over both moral preference and conceptual clarity. Thus characterised, the second inquiry consists of reviewing actual practice to determine the content of 'sustainable development' as a norm and, first and foremost, the 'practice' on the basis of which one can assert that sustainable development is not a mere concept, but a norm. To remove any major ambiguities, I will avoid relying on a wider conception of 'practice' which would include instruments such as the policy documents adopted at the 1992

¹⁷ See, in chronological order, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7, para. 140; WTO Appellate Body Report on *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (October 12, 1998), paras. 131 and 153; African Commission on Human Rights and Peoples' Rights, *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*, Communication No. 155/96, 2001 ('Ogoni case'), para. 52; *Hatton v UK*, Grand Chamber, ECtHR Application no. 36022/97, Judgment (8 July 2003), Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, para. 1; *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between The Kingdom of Belgium and The Kingdom of the Netherlands*, Award of 24 May 2005, UNRIAA XXVII 35, paras. 57-59; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 133, para. 80, Judgment, ICJ Reports 2010, p. 14, paras. 75-77 and 177; *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 (Islamic Republic of Pakistan v. Republic of India)*, PCA, Partial Award (18 February 2013), paras. 448-452; *China – Measures Related to the Exportation of Various Raw Materials, Appellate Body Report*, WT/DS 394/AB/R (13 January 2012), para 306; *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, Panel Report (26 March 2014), para. 7.263; *Advisory Opinion OC-23/17 of 15 November 2017, requested by the Republic of Colombia: Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)*, paras. 52-55.

¹⁸ For a clarification of the set of propositions that can be described as norms see G. H. von Wright, *Norm and Action. A Logical Enquiry* (London: Routledge/Kegan Paul, 1963), pp. 1-16.

Rio Conference, the 2002 Johannesburg Summit, the 2012 Rio+20 Summit, or the 2030 Agenda for Sustainable Development. All of them could be technically relevant, to the extent that they have been adopted and hence to a certain degree endorsed by States. But the implications for the normativity of sustainable development are arguable. It would thus introduce a whole new set of problems that can simply be avoided, for present purposes, by relying only on the unambiguous sources offered by treaties in force and, above all, the case-law explicitly referring to 'sustainable development'.

Relying on such body of practice, 'sustainable' development means both: (i) *development which, as a necessary procedural step, 'takes into account' environmental protection (integration); and (ii) which does so in a way that is consistent with the treaty obligations relating to environmental protection undertaken by a given country or, at the very least, with the core content of customary international environmental law applicable to all countries (i.e. the prevention principle, integrating the duty of due diligence in the context of environmental protection, as further expressed in procedural form by the duty of cooperation and the duty to conduct an environmental impact assessment)*.¹⁹ This understanding is suggested by the very first judicial recognition, in explicit terms, of the 'concept of sustainable development' by the ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*:

'Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations of pursuit of such interventions at an unconsidered and unabated pace, *new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.* This need to reconcile economic development with protection of the environment is aptly expressed in the *concept of sustainable development*'²⁰

The procedural step of 'tak[ing] into consideration' such new norms is often called 'integration'. There is ample support for integration in the case-law²¹ and this

¹⁹ See the chapter by Dupuy, Le Moli and Viñuales in this volume.

²⁰ *Gabčíkovo-Nagymaros*, above n. 17, para 140 (italics added).

²¹ See *Shrimp/Turtle*, above n. 17, paras. 131 and 153; *S.D. Myers Inc. v. Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award (13 November 2000), para 247; *Hatton v UK*, Grand Chamber, ECtHR Application no. 36022/97, Judgment (8 July 2003), para 128; *Iron Rhine*, above n. 17, para. 59; *Pulp Mills, Judgment*, above n. 17, para. 177; *Indus Water Kishenganga*, above n. 17, para. 449; *China – Raw Materials*, above n. 17, para. 306; *China – Rare Earths*, above n. 17, para. 7.263; *Advisory Opinion on Environment and Human Rights*, above n. 17, para. 52.

requirement is seen as a step towards the achievement of sustainable development.²² But this step is not sufficient to determine the content of 'sustainable' development as such. For development to be 'sustainable': 'new norms and standards [...] set forth in a great number of instruments' have to be given 'proper weight'. Those norms and standards encompass both treaties and range of other instruments codifying general international law. The relevant treaties involve many multilateral environmental treaties (MEAs) with almost universal participation but also regional and – as *in casu* – bilateral treaties.²³ But the minimal core content of the concept is the one recognised in general international law. To determine such content, a finer-grained analysis is necessary to distil from other judicial decisions what the inquiries conducted by different international courts and tribunals regarding this issue converge to.

A close examination of the relatively limited set of decisions that makes explicit and unambiguous reference to 'sustainable development' supports, indeed, the proposition that 'sustainable' development means development in accordance with customary international environmental law. In the case concerning the *Iron Rhine Railway*, the arbitral tribunal specifically discussed the aforementioned statement of the ICJ the *Gabčíkovo-Nagymaros* case and concluded that 'where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law'.²⁴ Paragraph 22 of the award explicitly refers to the prevention principle, recognised as a customary norm in the ICJ's *Advisory Opinion on the Legality of Nuclear Weapons*.²⁵ In the *Pulp Mills* case, the ICJ reasoned that the need to integrate economic and environmental considerations embodied in the concept of sustainable development was achieved *in casu* 'through the performance of both the procedural and the substantive obligations laid down by the [applicable river treaty]'.²⁶ In turn, these obligations were presented as specific treaty applications of core customary norms.²⁷ Such understanding has been subsequently confirmed in at least three other cases decided in different *fora*.²⁸

²² See Barral, V., 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 *EJIL* 377, 381; Dupuy, P.-M., 'Où en est le droit international de l'environnement à la fin du siècle?' (1997) 101 *RGDIP* 873, at 891.

²³ Such as the case of three other cases where bilateral treaties with no specific reference to environmental protection were concerned. See *Iron Rhine*, above n. 17, para. 59; *Pulp Mills, Judgment*, above n. 17, paras. 75–77; *Indus Waters Kishenganga*, above n. 17, para. 451.

²⁴ *Iron Rhine*, above n. 17, paras. 57–59 and 222.

²⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226, para. 29

²⁶ *Pulp Mills, Judgment*, above n. 17, paras. 75–77.

²⁷ *Ibid.*, paras 101 (referring to the prevention principle), 204 (recognising for the first time the customary requirement to conduct an environmental impact assessment), and 77, 102, 144–146 (referring to the duty of cooperation).

²⁸ *Indus Water Kishenganga*, above n. 17, para 450 (expressly stating that 'sustainable development' is translated through the duty to conduct an environmental impact assessment and the duty of vigilance and prevention); *China – Rare Earths*, above n. 17, paras 7.110–7.111 and 7.260–7.265 (referring to the principle of sustainable

Perhaps the clearest statement, although it omits the duty of cooperation, is provided in paragraph 450 of the partial award in the *Indus Water Kishenganga* case:

'Applied to large-scale construction projects, the principle of sustainable development translates, as the International Court of Justice recently put it in Pulp Mills, into "a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource." The International Court of Justice affirmed that "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works." Finally, the International Court of Justice emphasized that such duties of due diligence, vigilance and prevention continue "once operations have started and, where necessary, throughout the life of the project.'"²⁹

The evidence discussed so far demonstrates that sustainable development is indeed a norm and that its content must be determined by reference to the evolving treaty and customary law of environmental protection. This conclusion has three important implications. First, despite the contribution of some earlier studies to the conceptual clarification of sustainable development,³⁰ they do not represent accurate statements of the content of sustainable development in positive international law. Their contribution, and perhaps their fundamental purpose, lies in an attempt at formulating what sustainable development 'should' be (moral preference) and at clarifying how it interrelates with a range of other principles (conceptual clarity). Secondly, treaty and customary law do evolve and, over time, that evolution will place increasingly stringent conditions for development to be genuinely 'sustainable'. Thirdly, as discussed next, sustainable development is a peculiar type of norm, a 'normative concept', which cannot perform some functions unless it is decomposed into more specific norms.

IV. THE OPERATION OF SUSTAINABLE DEVELOPMENT IN LEGAL PRACTICE

A. The nature of sustainable development as a norm

On the very occasion when the ICJ recognised the 'concept' of sustainable development for the first time, Judge Weeramantry appended a Separate Opinion

development as requiring prevention of environmental harm); Advisory Opinion on Environment and Human Rights, para 55 (stating that, as a result of the interconnection between sustainable development and human rights, the principles of general international environmental law can be relied upon to determine the scope of the human rights guaranteed by the ACHR).

²⁹ Italics added.

³⁰ See Commission on Sustainable Development, Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26–28 September 1995; 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development', 6 April 2002 (New Delhi Declaration); European Commission, *The Law of Sustainable Development. General Principles* (2000).

dissenting with the majority on this point: '[t]he Court has referred to it [sustainable development] as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case'.³¹ This dissension epitomises a broader debate in the scholarship as to the nature of 'sustainable development'.³²

Here again, my focus will be on actual practice rather than on normative stances or attempts at conceptual clarification. For present purposes, it will suffice to make three observations. First, from the perspective of general international law, particular weight must be given to the position of the majority of the ICJ, which has confirmed the characterisation of 'sustainable development' as a 'concept' in a subsequent decision.³³ Secondly, the reservations expressed by Judge Weeramantry must be situated in their historical context. What he seemed to fear was a characterisation that would deprive 'sustainable development' of 'normative value'. Yet, with the benefit of hindsight, such 'normative value' has indeed been ascribed to the concept. As noted earlier, unlike 'eco-development', the 'green economy' or 'de-growth', 'sustainable development' is not a mere concept, but a normative concept. Thirdly, as discussed in more detail in the next section, using different terms such as a 'concept' or a 'principle' to characterise 'sustainable development' is only relevant if such characterisation carries different legal consequences.

The third observation raises an additional point. It assumes an analytical cartography of consequences or functions. These cartographies can be built in such a way as to reach a pre-determined conclusion driven by an end purpose (reflecting practice, asserting a moral preference, or enhancing conceptual clarity). That may well be an unavoidable feature of any account, but at the very least one must state as explicitly as possible the approach selected. My priority in this chapter is practical accuracy. The approach followed in the next section thus endeavours to provide an accurate reflection of legal practice. It relies on an analytical cartography under which whether a norm is a 'concept' or a 'principle' depends upon the function it performs in practice. In this account, the main difference between 'concepts' and 'principles' is that, unlike the former, the latter can perform a 'decision-making' function, i.e. operate as a primary rule of obligation governing the conduct of States and on the basis of which a case can be decided. From this perspective, 'sustainable development' is a concept. This will become clearer in the following discussion.

³¹ *Gabčíkovo-Nagymaros*, above n. 17, Separate Opinion of Judge Weeramantry, p. 85.

³² For a sample see above n. 1.

³³ *Pulp Mills, Judgment*, above n. 17, paras. 75-77.

B. Functions of sustainable development as a norm

1. Analytical distinctions

In order to map the operation of sustainable development in legal practice, it is necessary to follow a clear methodology that sets both the reach and the limits of the inquiry. In this section, I rely on a methodology that I developed in some of my earlier work on the principles of international environmental law and, more specifically, on the impact of the Rio Declaration.³⁴

This methodology is based on a distinction between three main functions. First, a norm may perform an 'architectural function' in that it may shape, at least partly, a treaty (or a section thereof), a legally-linked set of treaties or, more generally, a policy instrument (e.g. an agenda). I will call 'normative impact' the extent to which the concept of sustainable development has performed an architectural function. Given the nature of sustainable development, the normative impact can be expected to be vast. But, in my discussion, I will only include a sub-set of instruments selected on the basis of their importance (only major instruments, both binding and non-binding) and their representative character (only instruments adopted in or after the 1992 Rio Conference, in which sustainable development was mainstreamed). Secondly, a norm may perform an 'interpretive function' in that it is relied upon to clarify another norm, or to update its content (a peculiar form of clarification involving an intertemporal element), or to conciliate competing norms or the values underpinning them (another peculiar type of clarification seeking to harmonise different legally protected interests). Thirdly, a norm may perform a 'decision-making function' when it can be relied upon, as such and without reference to related but more specific norms, as a primary rule of obligation defining a conduct to decide a case. I will call 'jurisprudential relevance' the extent to which a norm can perform interpretive and decision-making functions.

As I shall endeavour to show, the concept of sustainable development performs only architectural and interpretive functions. So far, it has not performed a decision-making function in international adjudication and that is possibly an inherent rather than a merely practical limitation. Indeed, to the extent that the 'sustainable' component is defined by reference to treaty norms, it is not the concept of sustainable development as such which is used to decide the case but the relevant treaty norm. As for cases where the 'sustainable' component is defined by reference to customary norms, so far in all relevant cases the controlling norm was one of the expressions of

³⁴ See J. E. Viñuales, 'The Rio Declaration on Environment and Development. Preliminary Study', in J. E. Viñuales (ed.), *The Rio Declaration on Environment and Development. A Commentary* (Oxford University Press, 2015), pp. 20-21.

the concept of sustainable development (i.e. the prevention principle, the duty of cooperation, and the duty to conduct an environmental impact assessment). Even if other possible expressions of the concept of sustainable development are considered, such as the procedural requirement to 'take into account' environmental protection or to interpret existing norms in the light of environmental standards, the decision-making function would be performed by a stand-alone principle (e.g. the principle of integration or, more likely, a specific application of systemic integration or intertemporal law) or the function itself would be different (an 'interpretive' rather than a 'decision-making' function).

2. Normative impact

The normative impact of the concept of sustainable development can be assessed at different degrees of specificity. At a rather general level, one could note that references to 'sustainable development' appear in a number of important instruments, including non-binding policy instruments,³⁵ environmental agreements³⁶ and even agreements focusing on other matters.³⁷ Of particular note, at this first level, are the references to 'sustainable development' in the 1992 Rio Declaration on Environment and Development,³⁸ the 1994 Agreement establishing the World Trade Organisation, the UN Framework Convention on Climate Change and, more recently, the 2030 Agenda for Sustainable Development and 2015 Paris Agreement. Yet, this level is too general to ascertain whether the concept of sustainable development has indeed

³⁵ See above n. 15.

³⁶ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (UNFCCC), Article 3(4); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 148 (Kyoto Protocol), Articles 2(1), 10 (chapeau), 12(2); Paris Agreement, 12 December 2015, UNTS No. 54113, preamble, Articles 2(1), 4(1), 6(1), (2), (4), (8), (9), 7(1), 8(1), 10(5); Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79 (CBD), Article 8(e) (otherwise reference to 'sustainable use'); Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 39 ILM 1027 (2000) (Biosafety Protocol), preamble (mutually supportive); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits arising from their Utilization to the Convention on Biological Diversity, 29 October 2010, CBD Decision X/1 (2010) Annex I (Nagoya Protocol), preamble; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, UN Doc. A/AC.241/15/Rev. 7 (1994) (UNCCD), preamble, Articles 1(b), 5(b), 9(1), 18(1), Annex I, Article 6, Annex II, Article 3(1), Annex III, Article 2(c), Annex V, Article 2(i); Agreement for the Implementation of the Provisions of the United Nations Conventions on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, 2167 UNTS 3 (Straddling Fish Stocks Agreement), Article 24(1); United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 36 ILM 700, Article 24(2)(a); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, 2244 UNTS 337, preamble; Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, 2331 UNTS 202, preamble, Articles 1, 4(4)(c); Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 40 ILM 532, Article 7(3).

³⁷ See in particular Agreement establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154, preamble.

³⁸ See Rio Declaration, above n. 6, Principles 4 and 8.

played an 'architectural function', i.e. whether it has shaped an instrument or a section thereof.

At a second and more specific level, it appears that the concept of sustainable development has indeed performed an architectural function in the design of some important action plans, particularly the Agenda 21 (1992), the Johannesburg Plan of Implementation (2002), the Outcome document of the Rio+20 Summit (2012) and, above all, the 2030 Agenda for Sustainable Development (2015). The latter is particularly noteworthy, not only because of its scope and ambition but also, for present purposes, because of its attempt at integrating the economic, social and environmental dimensions of development, which is understood as the quest for prosperity for both developing and developed countries.³⁹ Yet, the integrative dimension is only one aspect of the legal concept of sustainable development. The other aspects, whether formulated in treaty or customary norms, are less present in the SDGs. Very few agreements and legal norms are explicitly referred to in the SDGs, in relation to economic development (e.g. the WTO, particularly the TRIPS Agreement⁴⁰), social development (e.g. human rights⁴¹ or the WHO Framework Convention on Tobacco Control⁴²) and environmental protection (e.g. the UNFCCC,⁴³ UNCLOS,⁴⁴ and international agreements of public access to information⁴⁵). But this may be explained by the fact that neither the SDGs nor the wider 2030 Agenda for Sustainable Development are intended to be legal instruments or to emphasise legal standards.

To find a clearer influence on the shaping of legal instruments, one must look beyond these policy instruments and track specific sections or even provisions of certain agreements. This third level of inquiry is much more specific and, within the limited bounds set for this chapter, it can only be illustrated. I will take two examples. The first concerns the 'sustainable development' provisions and chapters included in a growing number of bilateral and regional trade agreements concluded by the EU

³⁹ 2030 Agenda, above n. 14, para. 55.

⁴⁰ 2030 Agenda, above n. 14, SDG 3, target 3b, referring to the Agreement on Trade-Related Aspects of Intellectual Property Trade, 15 April 1994, 1869 UNTS 299.

⁴¹ 2030 Agenda, above n. 14, SDG 4, target 4.7, referring to human rights indistinctly.

⁴² 2030 Agenda, above n. 14, SDG 3, target 3a, referring to the WHO Framework Convention on Tobacco Control, 21 May 2003, 2302 UNTS 166.

⁴³ 2030 Agenda, above n. 14, SDG 13, target 13a, referring to the UNFCCC.

⁴⁴ 2030 Agenda, above n. 14, SDG 14, target 14c, referring to the United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 396.

⁴⁵ 2030 Agenda, above n. 14, SDG 16, target 16.10 referring to instruments on public participation indistinctly (e.g. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447.).

since 2007,⁴⁶ following the mandate given in the 2006 Global Europe Communication⁴⁷ and the 2006 Renewed Sustainable Development Strategy ('SDS').⁴⁸ Such provisions/chapters have been included in the EU economic partnership agreements with CARIFORUM States, South Korea, Central America, Colombia and Peru. As a general matter, they contain a reference to sustainable development as part of the 'context and objectives', which is then fleshed out by provisions on the right to regulate, the role of MEAs, the obligation not to lower environmental regulation to attract trade and investment, the promotion of green trade and investment, cooperation and implementation mechanisms, among others.⁴⁹ The second illustration is provided by the shaping of two specific 'market mechanisms', respectively in Article 12 of the Kyoto Protocol (the 'Clean Development Mechanism') and in Article 6(4) of the Paris Agreement (often called 'Sustainable Development Mechanism'). In both cases, the purpose of the mechanism is to conduct, in more efficient terms, mitigation projects while at the same time contributing to the development of the country hosting the project. The CDM operated for several years, raising several problems such as the concentration of projects on some emerging economies, the perverse incentives to maintain certain sectors only to profit from the carbon credits (technically 'certified emission reductions') resulting from them or, more generally, matters of environmental integrity. Thus, one should not overstate its achievements. Whether these challenges are inherent to the vagueness of the concept of sustainable development is unclear. The failure so far⁵⁰ to reach agreement on the specifics of the SDM suggests that the ability of the concept of sustainable development to genuinely perform an architectural function and shape a legal mechanism is limited by its very vagueness.

3. *Jurisprudential relevance*

The legal concept of sustainable development has played a significant role in international adjudication, but only from the perspective of its 'interpretive function'. As noted earlier, a norm may perform such a function when it is used to clarify or

⁴⁶ Zvelc, R., 'Environmental integration in EU trade policy: the Generalised System of Preferences, trade Sustainability Impact Assessments and Free Trade Agreements', in E. Morgera (ed.), *The External Environmental Policy of the European Union EU and International Law Perspectives* (Cambridge University Press, 2012), pp. 174-203.

⁴⁷ Commission, 'Communication – Global Europe: competing in the world: a contribution to the EU's Growth and Jobs Strategy', COM (2006) 567.

⁴⁸ Council, 'Review of the EU Sustainable Development Strategy (EU SDS) - Renewed Strategy', 26 June 2006, p. 21 available at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010917%202006%20INIT>>

⁴⁹ Zvelc, above n. 46, pp. 195-200.

⁵⁰ Draft Decision -/CMA.1, 'Matters relating to Article 6 of the Paris Agreement and paragraphs 36–40 of decision 1/CP.21, December 2018.

update another norm or to conciliate competing norms or the values underpinning them. The concept of sustainable development has explicitly performed this function in a number of cases. In what follows, I provide some illustrations relying only on those cases where 'sustainable development' is expressly mentioned as part of the legal reasoning of an international court or tribunal. I must note, however, that the legal 'concept', 'objective' or 'notion' relied upon is, in some cases, enshrined in a treaty rather than directly derived from customary international law.

The basis for the analysis is provided by the aforementioned excerpt of the ICJ judgment in the *Gabčíkovo-Nagymaros* case, where the Court noted, by reference to environmental norms, that they had 'to be taken into consideration, and [...] given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past'.⁵¹ *In casu*, there was an explicit provision in the applicable treaty allowing for the application of new norms. In order to fully understand the reach of this statement, it is therefore useful to see its operation in some other cases. In some cases, the 'objective' of sustainable development expressly mentioned in the preamble of the Agreement establishing the WTO was relied upon to interpret certain terms in a legally-linked treaty, namely the GATT and, more specifically, its Article XX. Thus, in *Shrimp/Turtle*, the WTO Appellate Body reasoned that the terms 'exhaustible natural resources' in Article XX(g) of the GATT had to 'be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'⁵² and, in this light, they included not only mineral but also living resources, such as turtles. Similarly, in *China – Raw Materials*, after referring to the 'objective of sustainable development' the AB stated that it understood 'the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns'⁵³ but then concluded that such considerations could not change the content of China's Accession Protocol. A more detailed discussion of this question was provided in *China – Rare Earths*, where the Panel made an explicit reference to the Rio Declaration:

'[T]he Panel believes that the international law principles of sovereignty over natural resources and sustainable development, which allow States to "freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development", are relevant to our interpretive exercise in this dispute. These two principles, which the Panel considers to be closely interrelated, are embodied in a number of international agreements. For example, the

⁵¹ *Gabčíkovo-Nagymaros*, above n. 17, para 140.

⁵² *Shrimp/Turtle*, above n. 17, paras. 129.

⁵³ *China – Raw Materials*, above n. 17, para. 306.

1992 Rio Declaration on Environment and Development provides in Principles 2 [prevention] and 4 [integration]’⁵⁴

Although, eventually the Panel reached a similar conclusion to that of the AB in *China – Raw Materials*, the explicit reference to the Rio Declaration as the expression of sustainable development is noteworthy.

Other adjudicative bodies have made reference to sustainable development or, at least, to integration, even in the absence of a specific treaty basis. In *SD Myers v. Canada*, an investment arbitration tribunal operating under Chapter 11 of the NAFTA relied on the Rio Declaration to consider, as part of the principles relevant to interpret Article 1102 of the NAFTA (non-discrimination), the idea that ‘environmental protection and economic development can and should be mutually

Supportive’.⁵⁵ In *Hatton v. UK*, a dissenting opinion signed by five judges relied on two non-binding instruments, Principle 1 of the Stockholm Declaration and Article 37 of the European Union’s Charter of Fundamental Rights (which expressly refers to sustainable development), to conclude that Article 8 of the European Convention on Human Rights should have been interpreted to accord more protection to the environment.⁵⁶ Although less clear, the role of sustainable development in the *Ogoni* case before the African Commission also deserves mention. The Commission reasoned that Article 24 of the African Charter (the collective right to a generally satisfactory environment) required Nigeria ‘to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’.⁵⁷ But these decisions do not provide a concrete and clear basis to understand the type of interpretive function performed by the concept of sustainable development. In order to reach that higher level of specificity, one must rely on three other decisions⁵⁸ where (i) the concept of sustainable development was specifically referred to, (ii) without any express basis in the applicable treaty, and (iii) with a sufficiently elaborate reasoning to understand the implications of interpreting a norm in the light of this concept.

In the *Iron Rhine* case, the arbitral tribunal had to consider whether to take into account environmental protection considerations in interpreting a treaty between Belgium and The Netherlands dating back to 1839. The tribunal expressly framed its analysis as a matter of ‘intertemporality in the interpretation of treaty provisions’.⁵⁹ In

⁵⁴ *China – Rare Earths*, above n. 17, para. 7.263.

⁵⁵ *S.D. Myers v. Canada*, above n. 21, para 247.

⁵⁶ *Hatton v UK*, Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic and Steiner, above n. 17.

⁵⁷ *Ogoni case*, above n. 17, para. 52

⁵⁸ *Iron-Rhine*; *Indus Water Kishenganga*; *Advisory Opinion on Environment and Human Rights*. All cited above n. 17.

⁵⁹ *Iron Rhine*, above n. 17, para 57.

this context, and explicitly relying on the ICJ's decision in *Gabčíkovo-Nagymaros*, the tribunal concluded that:

'Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" [...] And in that context the Court further clarified that "new norms have to be taken into consideration, and ... new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" [...] In the view of the Tribunal this dictum applies equally to the Iron Rhine railway'⁶⁰

This paragraph sheds light on the three questions identified above. Indeed, it expressly relies on 'the concept of sustainable development' (by reference to the ICJ) as it arises from general international law and, importantly, it does so with two specific consequences. First, sustainable development is used to interpret and, more specifically, to update a treaty that makes no mention of sustainable development and, given its date of conclusion, could not possibly imply any such consideration. Secondly, the specific consequence of interpreting this treaty in the light of the concept of sustainable development is the applicability of the prevention principle, which is mentioned in the first sentence and further specified in paragraph 222 of the award. Thus, the concept of sustainable development is not only a matter of systemic integration (as in the *Shrimp/Turtle* case) but also, explicitly, one of intertemporal law. This conclusion is confirmed by the reasoning of the tribunal in the *Indus Water Kishenganga* case.⁶¹

In both hypotheses (systemic integration and intertemporal law), the specific result is the need to interpret the relevant norm (e.g. a treaty) in the light *not of the concept of sustainable development as such* but in that of the more specific norms that embody the 'sustainable' aspect of sustainable development. In the *Iron Rhine* case, the tribunal made this point explicitly:

'The use of the Iron Rhine railway started some 120 years ago and it is now envisaged and requested by Belgium at a substantially increased and intensified level. Such new use is susceptible of having an adverse impact on the environment and causing harm to it. Today, in international

⁶⁰ *Ibid.*, para. 59.

⁶¹ *Indus Water Kishenganga*, above n. 17, para. 452.

environmental law, a growing emphasis is being put on the duty of prevention. Much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. The International Court of Justice expressed the view that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”⁶²

Similarly, in the *Indus Water Kishenganga* case, the arbitral tribunal noted that what it called (relying however on the ICJ) the ‘principle’ of sustainable development ‘translate[d]’ into the duties to conduct an EIA and, more generally, to prevent environmental harm.⁶³ The same conclusion can be reached by reference to the *Advisory Opinion of the ICtHR on the relations between environmental protection and human rights*. The Court noted indeed that ‘[a]s a consequence of the close connection between environmental protection, sustainable development and human rights’, which it also characterised as the ‘interdependence and indivisibility between human rights and environmental protection’:

‘in the determination of these State obligations [arising from human rights], the Court can make use of the principles, rights and obligations of international environmental law, which as part of the international *corpus iuris* contribute in a decisive manner to set the scope of the obligations arising from the American Convention in this area’⁶⁴

The latter point is also relevant to the assessment of the ‘decision-making function’ of the concept of sustainable development. I noted earlier that, so far, the concept has not performed, as such, a decision-making function and it is doubtful that it could do so. In the cases so far reviewed, the concept of sustainable development was relevant but somewhat removed from the primary norm of obligation governing the conduct of the States. The specific operation of the concept is to require a certain approach to interpretation (whether in the form of systemic integration or intertemporal law) and thereby to render applicable, for interpretation purposes, the specific primary rules of obligation (prevention, cooperation, EIA) defining the ‘sustainable’ aspect of sustainable development.

Such norms can perform an interpretive function but also, quite clearly, a decision-making function. Several examples of the latter possibility, both old and new, can be identified such as the *Trail Smelter* arbitration,⁶⁵ the *Costa Rica/Nicaragua*

⁶² *Iron Rhine*, above n. 17, para 222.

⁶³ *Indus Water Kishenganga*, above n. 17, para 450.

⁶⁴ *Advisory Opinion on Environment and Human Rights*, above n. 17, para 55 (our translation from the Spanish original).

⁶⁵ *Trail Smelter Arbitration*, RIAA, vol. III, pp. 1905–82, at 1965 (no harm)

case⁶⁶ or the *South China Sea* arbitration.⁶⁷ Even when the concept of sustainable development may appear to have a permissive effect, as suggested by a passage of the Panel Report in *China – Rare Earths*, it does not operate as a stand-alone primary norm. It is, in fact, the underlying primary rule (interpreted in the light of a norm such as the prevention principle) which remains controlling.⁶⁸ For these reasons, following my previous observations in [Section IV.A], sustainable development must be considered a normative 'concept', rather than a 'principle'.

V. 'SUSTAINABLE' VS. 'DEVELOPMENT'

The analysis of the history and legal expression of the concept of sustainable development conducted in this chapter shows that over the last half of a century, there has been a deliberate effort to conciliate, conceptually and legally, the terms of the environment-development equation. As noted earlier, the very concept of the sustainable development was selected to draw a veil over these differences and rally all countries to the cause. But this approach has not solved the equation. The tension between these two competing terms has not been removed.

Writing at the very end of 2018, I can say that, compared to the situation at the time of the first Founex meeting in June 1971, we have certainly made progress in the understanding of the scale and seriousness of the problem we face. Certain concepts, such as those of 'Planetary boundaries'⁶⁹ or the 'Anthropocene',⁷⁰ have been developed to convey the unprecedented magnitude of the crisis. What I still cannot say, is that this crisis or even the problems that manifest it (from climate change and the massive extinction of species, to air, land and water pollution, desertification or waste generation) are being successfully tackled.⁷¹ The reason is that we are still not ready to prioritise the environment over prosperity (development

⁶⁶ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, p. 665, para 162 (duty to conduct an EIA).

⁶⁷ *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paras. 941, 964 and 966 (prevention).

⁶⁸ *China – Rare Earths*, above n. 17, paras 7.110-7.111 ('The Panel agrees with China that an interpretation of the covered agreements that resulted in sovereign States being legally prevented from taking measures that are necessary to protect the environment or human, animal or plant life or health would likely be inconsistent with the object and purpose of the WTO Agreement. In the Panel's view, such a result could even rise to the level of being "manifestly absurd or unreasonable").

⁶⁹ See Rockstrom, J. et al, 'A safe operating space for humanity' (2009) 461 *Nature* 472.

⁷⁰ See Crutzen, P. J., 'Geology of Mankind' (2002) 415 *Nature* 23.

⁷¹ One exception is, perhaps, the recovery of the ozone layer thanks to the Montreal Protocol and the political economy considerations underpinning it. See Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 28.

and growth). This problem is not merely expressed but indeed embodied by the concept of 'sustainable development'.

This conclusion can be shown by relying on the economic theory of externalities. An externality is the effect of a transaction on those not participating in it (third parties). If such effects are harmful, we speak of 'negative externalities'. Environmental degradation, even of the scale of climate change, the massive species extinction or, all together, the Anthropocene epoch where humans are the defining geological force, are still seen as mere negative externalities of a transaction or, more specifically, a body of transactions that today is called 'development'. International law, much like law in general, first organises the legal aspects of the transaction (e.g. through sovereign prerogatives, investment law, trade law, etc.) and only then places an additional layer of regulation dealing with the negative environmental externalities. What we call international environmental law is, with rare exceptions (e.g. the moratorium of commercial whaling), the law of externalities, and it is becoming even more so due to the excessive reliance on market mechanisms. This external layer is only allowed to interfere with the underlying transaction up to a certain point beyond which the legal organisation of the transaction prevails. The *India – Solar Cells* case epitomised this problem.⁷² The local content requirements introduced by India were certainly illegal under international trade law. Yet, if we are realistic about tackling climate change, India must move massively into renewable energy, and we cannot truly expect that the massive transfer of public resources involved in a feed-in-tariff scheme will be operated with no political benefit for the local industry. Another illustration, which shows a similar imbalance between economic and social development, is provided by target 3a of SDG 3 ('Ensure healthy lives and promote well-being for all at all ages') which aims to:

'provide access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, which affirms the right of developing countries *to use to the full the provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights regarding flexibilities to protect public health*, and, in particular, provide access to medicines for all' (italics added)

The right 'to use to the full' the provisions of the TRIPS also means the obligation not to go beyond them. The TRIPS Agreement (organizing the transaction) is controlling, the flexibilities contemplated to accommodate public health considerations (tackling the 'externality') come second.

⁷² See *India — Certain Measures Relating to Solar Cells and Solar Modules, Report of the Panel*, 24 April 2016, WT/DS456/R.

The illegality of India's scheme or the re-affirmation of the TRIPS Agreement in SDG 3 are but two illustrations of a much wider and deeper phenomenon. International law and, as I have written elsewhere,⁷³ law in general are built upon an asymmetry whereby the productive transactions are first organised and only then an additional layer of law is introduced to tackle the externality, within clearly defined limits. We have grown so used to this asymmetry that we no longer see it. It is at the heart of all instruments that call for 'development' (organisation of the transaction) to be 'sustainable' (additional layer to tackle the externality'). At the margin, 'sustainable' will no longer be able to accommodate 'development' and, under the current thinking, development is organised in such a way as to prevail.

There were few times in history when the outrage arising from certain transactions of massive economic importance led to their outright banning. The banning of slavery was one such example. In an attempt to keep the legal recognition of the transaction, there were efforts to improve the lives of slaves (tackling merely the 'externality'), while keeping them legally subjected. There were also efforts to circumvent the ban through the contractual slavery of the 'coolie trade'. In the absence of such wide-ranging prohibition (e.g. a legally mandated phase-out of fossil fuels), another possibility may be that, in a display of Schumpeterian creative destruction, some new technological choices may diffuse in time to render our current pathways to development uncompetitive and obsolete.⁷⁴ Writing at the end of 2018, this is what appears to be the hope of political decision-makers. It is a bet, based on the egoism and lack of courage of the political class but also of all of us who timidly exercise our political rights; and the stakes have never been higher.

⁷³ See J. E. Viñuales, *The Organisation of the Anthropocene. In Our Hands?* (Leiden: Brill Research Perspectives, 2018).

⁷⁴ See J.-F. Mercure et al, 'Macroeconomic impact of stranded fossil-fuel assets' (2018) 8 *Nature Climate Change* 588.